No. ..... , Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

AND COMPLAINT

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Nicholas V. Olds
Esther E. Newton
Assistant Attorneys General

INDEX

	Page
Motion For Leave To File Complaint	1
Complaint and Exhibits	4
Certificate of Service	14

CITATIONS

Constitution of the United States, Article III, Section 2	1, 5
4 Stat 596 (Act of Congress, July 14, 1832)	5
4 Stat 628 (Act of March 2, 1833, c.54, sec. 5)	5
5 Stat 49 (Enabling Act of Congress, June 15, 1836)	2, 4, 5, 6, 9, 10, 11, 12
5 Stat 56 (Act of June 23, 1836)	2, 6, 9, 11
5 Stat 144 (Act of January 26, 1837)	2, 6
Executive Document 54, 24 Cong., 1st Sess	5, 8
28 U.S.C. 1251	5
Michigan Geol. Series 18—Michigan Geol. and Biol. Survey	7
H.R. No. 383	10
H. Rep. No. 380, 24 Cong., 1st Session	10
Mich. Concurrent Resolution No. 260	12

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No._____, Original

STATE OF MICHIGAN,

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vs.

STATE OF OHIO,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

TO THE HONORABLE

THE SUPREME COURT OF THE UNITED STATES

The State of Michigan by Frank J. Kelley, its Attorney General, asks leave of the Court to file its complaint against the State of Ohio and submits in support thereof the following:

STATEMENT IN SUPPORT OF MOTION

This is an action by the State of Michigan against the State of Ohio to be instituted in this Court under authority of Article III, Section 2 of the Constitution of the United States.

The purpose of the proposed action is to determine the boundary, to settle and adjudicate an existing boundary dis-

pute, and to confirm the jurisdiction and sovereignty of the State of Michigan over territory described in the complaint.

The State of Michigan claims that the territory in controversy became a part of the State of Michigan by virtue of the act of admission of the State of Michigan into the Union of January 26, 1837, 5 Stat 144, and by virtue of the real intent of the Congress of the United States in establishing the northern boundary of the State of Ohio and the southern boundary of the State of Michigan pursuant to the Enabling Act of Congress of June 15, 1836, 5 Stat 49, and Act of June 23, 1836, 5 Stat 56, 57, to settle and establish the northern boundary line of the State of Ohio.

For many years before and after the admission of Michigan into the Union there existed uncertainty with respect to the true location of the land boundary between Michigan and Ohio. During the years 1914-1917 the States of Michigan and Ohio, through legislative enactments and reciprocal action, determined, located and monumented the land boundary between Michigan and Ohio from the northwest corner of Ohio to its then eastern land terminus at post 71 located a little more than 900 feet west of the shore of Maumee Bay on swampy land, the northernmost cape of Maumee Bay then having been washed away, as is more particularly set forth in the complaint.

Although the states of Michigan and Ohio did establish, locate and monument their land boundary, nevertheless, there has never been a binding official determination made of the true location of the most northerly cape of the Maumee (Miami Bay) referred to and specified in the Enabling Act of June 15, 1836 and the aforesaid Act of June 23, 1836; and also there has never been any official determination made and fixing of the boundary between these states extending from the aforesaid point through

Lake Erie to the international boundary line. Although during the years there have been attempts and efforts made at resolving the location of this line, the states have been unable through any official action to arrive at any binding agreement, understanding or compact with respect thereto, as is more fully set forth in the complaint.

It is a matter of common concern and importance to the states and to the general public using the waters of Lake Erie that this boundary be ascertained, fixed and determined by judicial action of this Court under the powers vested in it in the Constitution of the United States and the applicable laws thereof.

The State of Michigan recently through a joint legislative committee and its attorney general offered to the Governor of Ohio to settle this dispute by mediation and negotiation by means of a joint boundary commission, but said offer on the part of the State of Michigan was rejected by the Governor of Ohio, as is more fully explained in the complaint.

For the foregoing reasons it is respectfully prayed that the Court grant leave to the State of Michigan to file its complaint against the State of Ohio.

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General
Nicholas V. Olds
Esther E. Newton
Assistant Attorneys General
Attorneys for the Plaintiff,
State of Michigan

The Capitol
Lansing, Michigan
~~October 31, 1966~~.
November 21, 1966

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No....., Original

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

COMPLAINT

The State of Michigan, by its Attorney General, Frank J. Kelley, brings this suit in equity against the State of Ohio in an original action for the purpose of settling a boundary dispute existing between them.

I

This complaint is filed for the following purposes:

1. To judicially determine the location of the "most northerly cape of the Maumee (Miami) bay" declared and established in the Enabling Act of Congress of June 15, 1836, c 99, 5 Stat 49.

2. To construe the line "from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie"

in accordance with the real intent of the Congress in enacting the Enabling Act of June 15, 1836 to be an extension of "a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay," i.e., a line following the arc of the great circle drawn from the south bend of Lake Michigan to the north cape of the Maumee bay as found and computed by A. Talcott, Capt. Engineers, pursuant to Act of Congress of July 14, 1832, 4 Stat 596, and Act of March 2, 1833, c 54, sec. 5, 4 Stat 628, and reported to the Congress in Executive Document 54, 24 Congress, 1st Session.

3. To declare and confirm the jurisdiction and sovereignty of the State of Michigan in all that part and area of Lake Erie lying northerly of the boundary line described in subparagraph (2) hereof and to declare and confirm the ownership in the State of Michigan of the bottom lands, including all minerals and other natural resources appertaining thereto, of Lake Erie lying northerly of said boundary line.

II

The jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and 28 U.S.C. 1251.

III

The Act providing for the admission of Michigan into the Union made the admission conditional on the acceptance by Michigan of the provisions thereof in regard to the boundaries therein described, including the boundaries between Michigan and Ohio, and the assent of the State of

Michigan thereto was given in accordance with the requirements of said Act of Congress, by resolution of a convention held for that purpose on the 15th day of December, 1836, so that, upon the passage of the Act of January 26, 1837, 5 Stat 144, Michigan became possessed of full statehood and of complete sovereignty over the territory within her boundaries as therein described. The common boundary between Michigan and Ohio is described in the Act of June 15, 1836, 5 Stat 49, which provides:

> "That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania."

The northern boundary of Ohio is also described in the Act of June 23, 1836, 5 Stat 56, 57, "an Act to settle and establish the northern boundary line of the State of Ohio," as follows:

> "That the northern boundary of the State of Ohio shall be established by, and extend to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay; thence, northeast, to the northern boundary line of the United States; thence, with said line, to the Pennsylvania line."

IV

Because the true location of the land boundary between

Michigan and Ohio was for many years in a state of uncertainty, between the years 1914-1917, the states of Michigan and Ohio, through legislative enactments and reciprocal action of their officials, caused said land boundary to be surveyed and monumented. A report of said joint surveying and monumenting of the land boundary line is contained in the "Biennial Report of the Director 1914-1916 and Report on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary," 1916 Pub. 22, Michigan Geol. Series 18, Mich. Geol. and Biol. Survey.

This joint survey extended from the northwest corner of Ohio to its then eastern land terminus at post 71, as is shown on page 82 of said report, located approximately 900 feet west of the shore along the bay on swampy land; according to map No. 9 of this document, a projected line extending from post 71 easterly states it is:

> "Toward original position of northernmost cape of Maumee Bay—Original monument and cape washed away."

Although during the years there have been attempts and efforts made at resolving the location of the boundary line between these states across Lake Erie, no binding agreement, understanding or compact has been arrived at by any official action.

V

1. In order to display graphically the boundary line now in dispute from the most northerly cape of Maumee Bay across Lake Erie to the international boundary line, there is attached a reproduction of the General Map which accom-

panied Captain Talcott's report of December 14, 1835, Executive Doc. 54, 24th Congress, 1st Sess., upon which plaintiff has drawn a projected extension of the line which joins the south bend of Lake Michigan with the north cape of the Maumee Bay as computed by A. Talcott.

Also on said map plaintiff has drawn a projected line across Lake Erie connecting the assumed position of north cape of Maumee Bay with a point on the international boundary line that became turning point 160 of said international boundary line. This line was shown on a base map printed by the United States Department of Interior, Geological Survey, compiled in 1910 and 1911, and is shown as having a bearing of approximately N 63° 45′ E. In a letter dated September, 1930 from the United States Department of Interior, Geological Survey, to L. R. Schoenmann, Land Economic Survey, Michigan Department of Conservation, Lansing, Michigan, it is stated:

> "The map of Ohio which accompanies Prof. C. E. Sherman's Final Report of Ohio Cooperative Topographic Surveys 1922 shows the boundary between Ohio and Michigan in Maumee Bay as an extension of the eastern end of the line, as established in 1915, to an assumed position of North Cape: thence through Lake Erie in a direct line to Turning Point 160 of the International Boundary as established by the International Waterways Commission upon the International Boundary between the Dominion of Canada and the United States through the St. Lawrence and Great Lakes. The position of the point is latitude 41° 51′ 48.582″ longitude 83° 04′ 08.931″."

This line was questioned by Professor C. E. Sherman, Inspector, in his final report, dated 1933, of the Ohio Co-

operative Topographic Survey. All of the foregoing is indicative of the uncertainty of the true course of the boundary line across Lake Erie to the international boundary line.

2. Contrary to the real and true intent of Congress in the passage and enactment of the Enabling Act of June 15, 1836 and the said Act of June 23, 1836, based upon the aforesaid report of A. Talcott transmitted by the President to the Congress, the State of Ohio erroneously claims that the projected line to be drawn across Lake Erie from the north cape of Maumee Bay to the international boundary line should be drawn on a bearing of N 45° E, and there is drawn on the map attached to this complaint a projected line as claimed at the present time by the State of Ohio.

The triangular area of Lake Erie encompassed by the projected line drawn across Lake Erie as claimed by Michigan and the projected N 45° E line as presently claimed by Ohio encompasses approximately 200 square miles of Lake Erie waters and bottom lands. This triangular area in dispute contains many valuable natural resources such as fisheries, bottom lands, minerals in the form of gas and oil, all of which are under the direct sovereign and proprietary control of the state legally entitled to them.

The disputed area has been and will continue to be a source of controversy over which state's laws should be applied and on numerous occasions the State of Ohio has unlawfully arrested Michigan fishermen in said disputed area.

3. Plaintiff, on information and belief, states that the State of Ohio has assumed to take over jurisdiction, control and ownership of the area of Lake Erie herein described and by administrative process has subdivided the area for

the purpose of issuing leases for the exploration and discovery of gas and oil, all of which is contrary to the just legal rights of the State of Michigan.

VI

The long standing controversy over the northern boundary of Ohio and the admission of Michigan into the Union culminated in the passage of the said Enabling Act of June 15, 1836 by the 24th Congress, 1st Session. The Committee on the Judiciary of the House reported to the Congress H.R. No. 383, a copy of which is attached. After extensive hearings the Committee filed its report dated March 2, 1836, H. Rep. No. 380, 24th Congress, 1st Session.

During the course of its investigation this Committee had for its use and consideration all pertinent documents transmitted by the President relating to the northern boundary of the State of Ohio and on page 18 of its report stated:

> "That it is expedient to establish the north boundary of Ohio, by a direct line drawn from the southern extreme of Lake Michigan, after intersecting the eastern boundary of Indiana, to the most northerly cape of the Maumee bay; thence, direct to the territorial line in Lake Erie, and by the said territorial line to the Pennsylvania line:
>
> "That the period has arrived, when Congress ought to exert, in part, a contingent power conferred by the ordinance, and to form a State north of this east line, of dimensions, and capacity to accommodate a population as nearly equal to the territory which may hereafter be formed into another State, as circumstances will

permit: the committee have the honor to report a bill enforcing these opinions''

Thus, it is clear that the real and true intent of the Congress, as evidenced by the contents of this voluminous report, was that the northern boundary of Ohio in connection with the question of admission of Michigan into the Union was to be projected across Lake Erie ''direct to the territorial line in Lake Erie'' on the course of ''a direct line drawn from the southern extreme of Lake Michigan • • • to the most northerly cape of the Maumee.''

The State of Michigan claims that if the real and true intent of the Congress were to be given effect in construing the language of the said Act of June 15, 1836 setting forth the conditions under which Michigan was to be admitted into the Union and the Act of June 23, 1836 establishing the northern boundary of the State of Ohio, this line would be a *direct* extension of Talcott's line across Lake Erie instead of a *broken* line as claimed by the State of Ohio.

VII

The State of Michigan has attempted at various times to make a settlement of its boundary dispute with Ohio. On January 10, 1966 Frank J. Kelley, Attorney General of the State of Michigan, transmitted to the Honorable James Rhodes, Governor of the State of Ohio, a letter, copy of which is attached, proposing ''that a joint boundary commission be authorized and empowered to hear all of the facts and make recommendations to the respective States'' as a means of arriving at an amicable solution of the existing dispute. However, this offer on the part of the State of Michigan was rejected by the Governor of the State of Ohio in a letter dated January 14, 1966 addressed to the Honor-

able Frank J. Kelley, Attorney General of the State of Michigan, copy of which is attached.

The Michigan Legislature taking cognizance of this situation adopted House Concurrent Resolution No. 260, copy of which is attached, being adopted by the House on April 6, 1966 and by the Senate on April 7, 1966. Among other things it requested the Attorney General of the State of Michigan to "take such legal action and to file and prosecute such legal proceedings as may be necessary in the Supreme Court of the United States or any other court of competent jurisdiction for the purpose of securing a final and judicial determination of the location of said boundary."

VIII

Wherefore, the State of Michigan prays this Honorable Court to grant the following relief:

1. Declare and determine that the boundary line in Lake Erie between the State of Michigan and the State of Ohio from Post No. 71 consists of a direct line projected across Lake Erie to the international boundary line as being an extension of a direct line drawn from the southern extreme of Lake Michigan to the most northerly cape of Maumee in the manner and form more fully stated in this complaint.

2. Judicially determine the location of the most northerly cape of Maumee (Miami) bay as the same was defined and described in the Enabling Act of Congress of June 15, 1836, said cape being the point of beginning of the boundary line to be projected across Lake Erie to the international boundary as hereinbefore described.

3. Declare and confirm the jurisdiction and sovereignty

of the State of Michigan in all that part and area of Lake Erie lying northerly of the boundary line hereinbefore described and declare and confirm the ownership in the State of Michigan of the bottom lands, including all minerals and other natural resources appertaining thereto, of Lake Erie lying northerly of said boundary line.

4. Since the foregoing requires the ascertainment of facts and involves disputed questions of law, appoint a special master with full power to hear the issues of fact and law and file his recommendations.

5. Grant such other and further relief as this Court may deem proper and necessary.

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Nicholas V. Olds
Esther E. Newton
Assistant Attorneys General

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the ~~31st~~ 21st day of ~~October~~ November, 1966, he served the within and foregoing "Motion for Leave to File Complaint and Complaint" upon the sovereign State of Ohio, the defendant in said action, in the following manner, as prescribed by Rules 9 and 33 of said Court:

He deposited at the post office at Lansing, Ingham County, Michigan, two copies each of the within and foregoing Motion and Complaint, securely enclosed in an envelope, air mail postage duly prepaid, addressed to each of the following officials of said defendant State respectively, at his post office address, as stated below, that is to say:

Honorable James A. Rhodes
Governor of the State of Ohio
Columbus, Ohio

Honorable William B. Saxbe
Attorney General of the State of Ohio
Columbus, Ohio

Robert A. Derengoski

FOLLOWING FOLDOUTS/EXHIBITS ARE TOO LARGE TO FILM

A BILL

To establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union on certain conditions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the northern boundary line of the State of Ohio shall be established by a direct line drawn from the southern extremity of Lake Michigan to the most northerly cape of the Maumee (Miami) bay, after intersecting the eastern boundary line of the State of Indiana; thence northeast to the boundary line between the United States and Canada, in Lake Erie; thence with said line to the Pennsylvania line.

SEC. 2. *And be it further enacted*, That the constitution and State Government, which the people of Michigan have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed: *Provided, however*, That the said State shall consist of, and have jurisdiction over, all the territory included within the following boundaries, and over none other, to wit: beginning at the point where the above named north boundary of Ohio intersects the eastern boundary of Indiana, and running thence with the said boundary line, as above specified, to the territorial line in Lake Erie; thence with the said territorial line through Detroit river, Lake Huron, and Lake Superior, to a point where the said territorial line last touches Lake Superior; thence in a direct line through Lake Superior to the mouth of the Montreal river; thence through the middle of the main channel of Montreal river to the middle of the Lake of the Desert; thence in a direct line to the nearest head water of the Menominee river; thence through the middle of that fork of the said river first touched by said line to the main channel of the said Menominee river, and through the middle of the same to the middle of Green bay; thence through the middle of the main channel of Green bay to the middle of Lake Michigan; thence through the middle of Lake Michigan to the northern boundary line of Indiana, as established by the act of the 19th of April, 1816; thence due east with the said north boundary line to the northwest corner of said State; thence south with the east boundary line of Indiana to the place of beginning.

SEC. 3. *And be it further enacted*, That the State of Michigan shall be admitted into this Union, on an equal footing with the original States, in all respects whatever, upon these fundamental conditions: that the boundary of the said State shall be the lines and limits above established, and that these boundaries shall receive the assent and approbation of the Senators and Representative elected to Congress, and the Legislature of the said State, acting respectively under the authority of the ordinance of the convention which formed the constitution of said State; and as soon as said assent and approval shall have been made, and given, the President of the United States shall be authorized to announce the same, by proclamation; and thereupon, and without any further proceeding on the part of Congress, the admission of the said State into the Union shall be considered as complete, and the Senators and Representative who have been elected by the said State shall be entitled to take their seats in the Senate and House of Representatives, respectively, without further delay.

COPY

STATE OF MICHIGAN

OFFICE OF THE

ATTORNEY GENERAL

LANSING, MICHIGAN

January 10, 1966

The Honorable James Rhodes
Governor of the State of Ohio
The Capitol
Columbus, Ohio

Re: Michigan-Ohio Boundary in Lake Erie

My dear Governor Rhodes:

Although various attempts have been made during the past several decades to determine and settle the boundary between Michigan and Ohio from the land boundary across Lake Erie to the International Boundary Line, so far none of these efforts have proved successful. Consequently, uncertainty still exists as to where the boundary actually is or should be, resulting in confusion regarding the enforcement of our laws, as well as with respect to the ownership of the bottom land of Lake Erie and its minerals.

The Michigan Legislature has formed a special joint Senate-House committee, Representative Raymond C. Kehres of Monroe serving as chairman, for the purpose of investigating this problem and determining what should be done by both the legislative and executive branches of government to achieve an amicable solution with Ohio. I might say, parenthetically, the same situation exists concerning the boundary in Lake Michigan between Michigan and Indiana and also between Michigan and Illinois.

I have discussed this informally with Attorney General William Saxbe, but since this question would affect the State of Ohio at its broadest level, I am addressing this communication to you and invite you to give consideration to the following plan. The joint Senate-House committee and I have in mind a conference to be arranged between representatives of the executive and legislative branches of our two states to be held in Columbus to explore and discuss this situation with the hope and expectation that a joint

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boundary commission be authorized and empowered to hear all of the facts and make recommendations to the respective states. If this course were agreed upon the legislature of our State meeting this year, could pass the legislation necessary to organize our section of the boundary commission. Of course, we would await the meeting of the Ohio Legislature in 1967 to pass similar legislation.

Will you please give this proposal your earnest consideration and advise me as soon as possible as to whether you are in agreement, and if not, what alternative proposal you may want to make.

Respectfully yours,

FRANK J. KELLEY
Attorney General

cc: Rep. Raymond Kehres
Mr. James Hanson - (Sent 1-19-66)

COPY

JAMES A. RHODES
GOVERNOR

STATE OF OHIO
OFFICE OF THE GOVERNOR
COLUMBUS 43215

January 14, 1966

OFFICE OF THE
ATTORNEY GENERAL
RECD JAN 17 1966
Answered

The Honorable Frank J. Kelley
Attorney General
State of Michigan
Lansing, Michigan 48902

Dear Mr. Kelley:

It is fortunate indeed that the question with respect to the Ohio-Michigan boundary does not urgently demand solution as the legislative bodies of our two states are not synchronized. Apparently the Michigan Legislature is in session or has recently been in session. The Ohio General Assembly adjourned sine die some months ago and will not again be in session until January 1967. When it convenes its 107th session, it is likely to be a much different body from the present one as its members will be elected under a new "one man-one vote" apportionment.

It would seem to me that prompt action could be taken to define the boundary wherever it might be in question if Michigan would simply petition the United States Supreme Court for a declaratory judgment on the matter. I understand that the Supreme Court has original jurisdiction in any disputes between states and if it took jurisdiction of the case would be able to name a Special Master to hear evidence.

Sincerely,

JAMES A. RHODES
Governor

JAR:mh

cc: The Honorable William B. Saxbe
Attorney General of Ohio

RECEIVED
FEB 15 1966
LEGAL DIVISION
DEPT. OF CONSERVATION

STATE OF MICHIGAN

MICHIGAN LEGISLATURE

House Concurrent Resolution No. 280

Offered by Representatives Kildee, Deakin and Farnsworth

A CONCURRENT RESOLUTION REQUESTING THE ATTORNEY GENERAL TO FILE AND PROSECUTE PROCEEDINGS IN THE UNITED STATES SUPREME COURT FOR THE DETERMINATION OF THE BOUNDARY BETWEEN THE STATE OF MICHIGAN AND STATE OF OHIO ACROSS LAKE ERIE FROM PORT NO. 71 OF THE ESTABLISHED AND DETERMINED LAND BOUNDARY BETWEEN MICHIGAN AND OHIO TO THE INTERNATIONAL BOUNDARY LINE.

WHEREAS, The Legislatures of the State of Michigan has been concerned with the problem of determining and establishing the boundary line between the State of Michigan and the State of Ohio across Lake Erie particularly from post No. 71 of the land boundary to the International Boundary Line; and

WHEREAS, A Joint Committee of the House of Representatives and Senate under the chairmanship of Representative Raymond C. Kildee has made an investigation of this problem jointly with Attorney General Frank J. Kelley; and

WHEREAS, From said investigation it appears that the boundary between the State of Michigan and the State of Ohio across Lake Erie particularly from post No. 71 of the land boundary line to the International Boundary Line has never been officially legally determined and established; and

WHEREAS, Efforts on the part of the Joint Legislative Committee and the Attorney General of the State of Michigan to have said boundary determined and established by a Joint Boundary Commission composed of representatives of both States has been rejected by the Governor of Ohio pursuant to his letter dated January 14, 1966, addressed to Attorney General Frank J. Kelley of the State of Michigan reading as follows:

"It is fortunate indeed that the question with respect to the Ohio-Michigan boundary does not apparently demand solution as the legislative bodies of our two states are not synchronized. Apparently the Michigan Legislature is in session or has recently been in session. The Ohio General Assembly adjourned over the recess months ago and will not again be in session until January, 1967. When it reconvenes in 1967, even if it is then willing to set up a qualified boundary body from the present one as its members will be elected under a new 'one man-one vote' apportionment.

"It would seem to me that prompt action could be taken to define the boundary whenever it might be in question if Michigan would simply petition the United States Supreme Court for a declaratory judgment on the matter. I understand that the Supreme Court has original jurisdiction in any dispute between states and if it took jurisdiction of the case would be able to name a Special Master to hear evidence."; and

WHEREAS, The determination and establishment of this boundary is essential with respect to the enforcement of the laws of each state and to the determination of the ownership of the bottom lands of Lake Erie between these states; now therefore be it

RESOLVED BY THE HOUSE OF REPRESENTATIVES (the Senate concurring), That the Attorney General of the State of Michigan be requested to take such legal action and to do and perform such legal proceedings as may be necessary in the Supreme Court of the United States or any other court of competent jurisdiction for the purpose of securing a final and judicial determination of the location of said boundary; and be it further

RESOLVED, That should the Attorney General have special or extraordinary expenses with regard to the prosecution of such proceedings that the Legislature would give favorable consideration to any special budgetary items needed to defray said expense; and be it further

RESOLVED, That all departments and agencies of the state government cooperate with the Attorney General and make available to him any information, data, documents and services which he may need in the prosecution of such proceedings; and be it further

RESOLVED, That a copy of this concurrent resolution be transmitted to the Attorney General of the State of Michigan, Frank J. Kelley.

Adopted by the House April 6, 1966.

Adopted by the Senate April 7, 1966.

Eugene B. Farnum
Secretary of the Senate.

F. Thore Thatcher
Clerk of the House of Representatives.



NOV 21 1966

No. 30, Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

STATE OF MICHIGAN,

Plaintiff,

v.

STATE OF OHIO,

Defendant.

BRIEF OF THE STATE OF MICHIGAN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

FRANK J. KELLEY
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Solicitor General

Nicholas V. Olds
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Attorneys for the Plaintiff
State of Michigan

The Capitol
Lansing, Michigan

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INDEX

Argument:	Page
I. Historical Background	1
II. The Boundary Involved	7
III. The Location of the Northerly Cape of the Maumee Uncertain	14
IV. Power of the Court to Decide Boundary Cases	14
Conclusion	15
Appendix	17

CITATIONS

Cases:	Page
Becker v. Detroit Savings Bank, 269 Mich 432	12
Boyer-Campbell Co. v. Fry, 271 Mich 282	12
Michigan v. Wisconsin, 272 US 398	13
State of Rhode Island v. State of Massachusetts, 12 Pet. (37 US) 657	13, 15
Wisconsin v. Michigan, 297 US 547	13
Constitution and statutes:	
U. S. Constitution, Art. I, Sec. 10, Clause 3	13
Ohio Const. of 1802, Art. VII, Sec. 6	3
Ordinance of 1787	2, 6
Act of April 30, 1802, 2 Stat. 173	3
Act of January 11, 1805, 2 Stat. 309	3
Act of May 20, 1812, 2 Stat. 741	3
Act of July 14, 1832, 4 Stat. 596	4
Act of March 2, 1833, c. 54 Sec. 5, 4 Stat. 628	5

~~Cases:~~ Page

Act of June 15, 1836, c. 99, 5 Stat. 49 7
Act of June 23, 1836, c. 117, 5 Stat. 56 8
Congressional approval of Michigan-Wisconsin-Minnesota Compact - PL 844, Chap. 757, 62 Stat. 1152 (1948) 14

Congressional material:

Document 7, p. 2, Executive Documents, 24th Cong., 1st Sess. 5
Document 54, Executive Documents, 24th Cong., 1st Sess., Vol. 2 5
Report No. 211, p. 14, Sen. Doc., 24th Cong. 1st Sess. 9
Report No. 380, Report of Committees, 24th Cong. 1st Sess., p. 18 8

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1945 Concurrent Resolution 12
1947 House Concurrent Resolution 12, 17

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1933 Joint Resolution, 115 Ohio Laws 685, GC 13855-1 10

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Cases: Page

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Final Report of Ohio Cooperative Topographical Survey (1933)—Professor C. E. Sherman 10

The Southern and Western Boundaries of Michigan, Mich. Pioneer and Historical Collections, XXVII (1896), pp. 346-390—Anna May Soule 2

The Ohio-Michigan Boundary Dispute Re-examined, Ohio State Archaeological Historical Quarterly, Oct. 1936, pp. 1-21—Carl Wittke 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1966

No. ——, Original

STATE OF MICHIGAN,

Plaintiff,

v.

STATE OF OHIO,

Defendant.

BRIEF OF THE STATE OF MICHIGAN IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

HISTORICAL BACKGROUND

This boundary dispute traces its beginnings to the stormy controversy that raged over Michigan's admission into the Union in 1836-1837.[1] The dispute became so acute and

[1] For a detailed account of this aspect of the territorial dispute between Michigan and Ohio, see:

Willis F. Dunbar — Michigan: A History of the Wolverine State (1965) Chap. 10.

George J. Miller — The Establishment of Michigan's Boundaries: A Study In Historical Geography, Bulletin of the American Geographical Society (1911) XLIII, pp. 339-351. *(See Page 2)*

feelings between the people of the Territory of Michigan (at that time voiceless and voteless in the halls of Congress) and the State of Ohio became so charged with emotion that at one time it seemed war might be waged between them. In fact, in the pages of history it has taken on the name of the "Toledo War." Although in retrospect historians depict the "Toledo War" as having its overtones of comic opera, nevertheless, in those days it was real serious business. An actual armed conflict was averted only by the intervention of the President of the United States and the Congress.

The states of Ohio and Michigan were carved out of the northwest territory which was brought into being by the Virginia cession on condition that it would be used for the formation of new states. The result was the adoption by the Congress of the Ordinance of 1787 providing that not less than three nor more than five states should be formed in this large expanse of land lying northwest of the river Ohio. In this ordinance Congress reserved the authority at its discretion to form "one or two states in that part of said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan." This imaginary "east and west" line has since been known as the Ordinance Line. At this early time knowledge of geography was imperfect, no actual land surveys had been made and it was believed that the

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Anna May Soule	The Southern and Western Boundaries of Michigan, Mich. Pioneer and Historical Collections, XXVII (1896), pp. 346-390.
Claude S. Larzelere	The Boundaries of Michigan, Mich. Pioneer and Historical Collections XXX (1903), pp. 1-26.
Carl Wittke	The Ohio-Michigan Boundary Dispute Reexamined, Ohio State Archaeological Historical Quarterly, Oct. 1936, pp. 1-21.

"southerly bend or extreme of Lake Michigan" lay considerably to the north of its true location. Based on this premise it was apparently assumed that the Ordinance Line when projected eastward from the southerly bend of Lake Michigan would strike the west shore of Lake Erie near or north of Maumee Bay.

In 1802[2] Congress authorized the people of Ohio to draft a constitution preparatory to applying for statehood. A doubt arose in the minds of the framers of the constitution of Ohio whether, in fixing the boundaries of the new state, the use of the Ordinance Line as a boundary description would assure to Ohio the mouth of the Maumee River and its outlet in Maumee Bay. Delegates to the Constitutional Convention of Ohio inserted in the boundary descriptions of their proposed constitution a proviso that if it should be found that the Ordinance Line would not intersect Lake Erie, or that it would intersect the Lake east of the mouth of the Maumee River, then with the "assent of Congress" the northern boundary of the state should be a direct line drawn from the southerly extreme of Lake Michigan to the northern cape of Maumee Bay.[3]

In January 1805 Congress in creating the Michigan territory specified the Ordinance Line as the territory's southern boundary.[4]

Further controversy was halted by the War of 1812. Early in that year Congress authorized the President to cause a survey to be made of the northern and western boundaries of Ohio.[5] But the work was not undertaken until 1816 when Edward Tiffin, Surveyor General of the

[2] Act of April 30, 1802, 2 Stat. 173
[3] Ohio Const. of 1802, Art. VII, Sec. 6.
[4] Act of Jan. 11, 1805, 2 Stat. 309
[5] Act of May 20, 1812, 2 Stat. 741

United States and formerly Governor of Ohio, was ordered to proceed. He commissioned his deputy, William Harris, to lay out the boundary line and commanded him to establish it in accordance with the provisions of the Ohio Constitution of 1802. The line so surveyed ran from the southern extreme of Lake Michigan to the northern cape of Maumee Bay and became known as the Harris Line. This survey put Toledo in Ohio. Governor Cass of Michigan protested the Harris survey and President Monroe ordered a new survey which was made by John A. Fulton in 1818. This survey established the Fulton Line, running below Toledo and putting that city in Michigan. The land between the Harris Line and the Fulton Line was a wedge-shaped tract, five miles wide at the Indiana border and eight miles wide at Lake Erie. It was soon known as the "Toledo Strip." Michigan was satisfied with the Fulton survey but Ohio was not.

In order to assist it in resolving the controversy the Congress by Act of July 14, 1832, 4 Stat. 596 directed the President of the United States to do the following:

> "That the President of the United States cause to be ascertained by accurate observation, the latitude and longitude of the southerly extreme of Lake Michigan; and that he cause to be ascertained, by like observation, the point on the Miami of the Lake which is due east therefrom, and also, the latitude and longitude of the most northerly cape of the Miami bay, also, that he cause to be ascertained, with all practicable accuracy, the latitude and longitude of the most southerly point in the northern boundary line of the United States in Lake Erie; and also, the points at which a direct line drawn from the southerly extreme of Lake Michigan to the most southerly point in said northern

boundary line of the United States, will intersect the Miami river and bay; and also, that he cause to be ascertained by like observation, the point in the Mississippi which is due west from the southerly extreme of Lake Michigan, and that the same observation be made, and the result thereof returned, to the proper department within the current year."

By Act of March 2, 1833, c. 54, sec. 5, 4 Stat. 628 the time for taking the observations was extended to December 31, 1835.

Captain Talcott of the Corps of Engineers was the officer charged with executing this Act. A copy of his report was transmitted to the 24th Congress (Doc. 7, page 2, Executive Doc., 24th Cong. 1st Sess.). His drawings illustrating the position taken for determining the latitude and longitude of the different points specified by law, together with a general map showing the relative positions of each of the several lines and points specified in the law were sent by the President to the Congress (Doc. 54, Executive Documents, 24th Cong. 1st Sess. vol. 2). We have appended to the complaint a reproduction of the general map prepared pursuant to this Act.

In none of these surveys or observations nor on any map or drawing prepared and submitted either to the President or to the Congress, can there be found any line drawn from the north cape of Maumee Bay across Lake Erie to the boundary between the United States and Canada.

With the death of Territorial Governor Porter in 1834, Stevens T. Mason became Acting Territorial Governor and initiated a campaign to change the Territory of Michigan to a state. Mason insisted that Michigan now met the

population requirements of the Ordinance of 1787 and was entitled as a matter of right to enter the Union, subject only to the adoption of a state constitution and the establishment of state government. Mason called attention to the Ordinance Line fixed in the Ordinance of 1787 as giving Michigan a clear title to the Toledo Strip. He called a constitutional convention to meet in May of 1835. Governor Lucas of Ohio was not unaware of Mason's activities. In April of 1835, in a determined effort to re-mark the Harris Line and to subject the Toledo Strip to Ohio law, he ordered out the militia to protect his surveyors. As a part of the scheme, Ohio courts were surreptitiously convened in the Toledo Strip. Governor Mason countered by ordering General Brown to Monroe to assemble the militia and there Mason joined him on April 1, 1835 to direct operations. Serious conflict was averted by President Jackson's removal of Mason as territorial governor and the disbanding of the militia.

In 1835 the people of the Territory of Michigan assembled in constitutional convention in the City of Detroit and on the second Monday of May of that year adopted the Constitution of Michigan of 1835. In its constitution it embraced the Ordinance Line of 1787 and thus injected this explosive issue into the debates of Congress by presenting this constitution to the Congress for approval. But this effort was unsuccessful and Congress, in an Act of June 15, 1836, established the boundaries for the State of Michigan and conditioned her admission into the Union upon the acceptance of the boundaries so established.

During the course of the controversy ex-President John Quincy Adams, favoring the cause of the Territory of Michigan, is reported to have said:

"Never in the course of my life have I known a controversy of which all of the right was so clear on one side and all the power so overwhelmingly on the other, never a case where the temptation was so intense to take the strongest side at the duty of taking the weakest was so thankless."[6]

The Michigan legislature called a convention for assenting to the conditions for admission to meet at Ann Arbor on September 26, 1836. When convened it promptly rejected the proffered boundaries by a decisive vote and adjourned. Political leaders rallied a second convention which met at Ann Arbor on December 14, 1836 and gave its "assent" on December 15 to the Act of Congress. President Jackson reported this fact to Congress on December 27, 1836 and a bill was passed which admitted Michigan into the Union on January 26, 1837.

THE BOUNDARY INVOLVED

The act enabling Michigan to be admitted into the Union (the Act of June 15, 1836, c. 99, 5 Stat. 49) describes the common boundary between the states of Michigan and Ohio as follows:

"A direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; *and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake*

[6] George J. Miller, The Establishment of Michigan's Boundaries, supra.

Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania." (Emphasis supplied)

The Act of June 23, 1836, c. 117, 5 Stat. 56 (an act to settle and establish the northern boundary line of the State of Ohio) describes the northern boundary of Ohio to be:

> "A direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay; *thence, northeast,* to the northern boundary line of the United States; thence, with said line, to the Pennsylvania line."

The judiciary committee of the House reporting on a bill which finally became the Michigan Enabling Act of June 15, 1836 apparently understood that the line from the north cape of Maumee bay would be extended direct to the international boundary line from the southern extreme of Lake Michigan through the north cape of Maumee, since the committee in its report to the House stated:

> "That it is expedient to establish the northern boundary of Ohio, by a direct line drawn from the southern extreme of Lake Michigan, after intersecting the eastern boundary of Indiana, to the most northerly cape of the Maumee; *thence, direct to the territorial line in Lake Erie, and by the said territorial line to the Pennsylvania line."*[7]

Officials representing Ohio before the committees of Congress at that time claimed that the northern boundary of Ohio should be drawn on a course beginning at the southern extreme of Lake Michigan to the north cape of the Maumee

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[7] Rep. No. 380, Report of Committees 24th Cong. 1st Sess. p. 18.

bay, and thence through Lake Erie to the international boundary line. It is apparent from the report filed by the Judiciary Committee of the Senate that the north cape of the Maumee bay was the "most northern point contended for by Ohio." (Report 211, page 14, Sen. Doc. 24th Cong. 1st Sess.)

It can be seen from an examination of the general map of Talcott attached to the complaint that the line set by Congress in 1836 from the southern extreme of Lake Michigan to the north cape of Maumee bay runs in a northeasterly direction. There is nothing in the legislative history indicating that this line should run on a different bearing in its extension from the north cape to the international boundary line.

The boundary question remained in a state of quiescence from these early years until 1915-1917 when the land boundary between Michigan and Ohio was ascertained and monumented by a joint survey which ended at post 71 which is located 900 feet west of the shore of Lake Erie.[8] No question at that time arose with respect to the location of the boundary extending across Lake Erie to the international boundary line.

As is alleged in paragraph 5 of the complaint, reference is made to a base map of Ohio printed by the United States Department of the Interior, Geological Survey, in 1910-1911 showing the Lake Erie segment of the boundary as connecting the north cape with turning point 160 of the international boundary on a bearing of approximately

[8] "Biennial Report of the Director 1914-1916 and Report on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary," 1916 Pub. 22, Michigan Geol. Series 18, Mich. Geol. and Biol. Survey.

N 63° 45′ E; and that in 1922 Professor C. E. Sherman, an official of Ohio, apparently drew the line on the same bearing on topographical survey maps. Later, however, Professor Sherman asserted that this was an error and in Vol. IV of the Final Report of Ohio Cooperative Topographical Survey, 1933, on p. 43 he states that the line in Lake Erie between Ohio and Michigan is not settled. He said:

> "In conclusion it should be noted that the Lake portion of the Ohio-Michigan boundary is erroneously shown on the two maps in envelope on the rear cover of this book. The line as shown on these two maps connects North Cape with International boundary turning point 160, and has a bearing of approximately N 63° 45′ E. The law prescribes a line bearing *northeast* from North Cape. In nautical language this is a specific direction meaning N 45° E. Therefore the area of Ohio, if scaled only to such boundaries as are shown on the two maps just mentioned will be too small by the triangle included between the two foregoing lines and the international boundary. The error thus introduced would be about 70.6 square miles."

On June 8, 1933 the 90th General Assembly of Ohio[9] passed the following joint resolution relative to this segment of the boundary line:

> "WHEREAS, *Uncertainty has existed concerning the boundary between the states of Ohio and Michigan in Lake Erie,* due to the omission of this portion of the boundary on some maps and its incorrect position on others, and
>
> "WHEREAS, The easterly terminal monument of the Ohio-Michigan land boundary line set in 1817 by

[9] 115 Ohio Laws 685, G C § 13855-1

Andrew Harris has disappeared, due to the washing away of North Cape at the place where the monument originally stood, and

"WHEREAS, The earliest United States lake survey charts of the region show that the aforesaid terminal monument was at or near the intersection of the land-line between the two states and a line drawn south forty-five degrees west (S. 45° W.) through the center of Turtle Island which is located at latitude 41° 45′ 08.8″ and longitude 83° 23′ 28.8″ according to primary triangulation of the United States lake survey published in 1882, and

"WHEREAS, The center part of the island was preserved by a circular concrete sea wall about 190 feet in diameter by the U. S. lighthouse service, which wall is still standing; therefore,

"*Be it resolved by the General Assembly of the State of Ohio,* that with the concurrence of the legislature of Michigan, the boundary line between the two states in Lake Erie shall be a line passing through the center of the aforesaid circular wall and bearing south forty-five degrees west (S. 45° W.) therefrom until it shall intersect the land-line between the two states as marked and monumented by them in 1915; and that from the aforesaid center of the circular wall the boundary in Lake Erie shall extend north forty-five degrees east (N 45° E) until it shall intersect the international boundary between the United States and Canada, it being understood that all bearings herein referred to shall be measured from a true meridian through the center of the aforesaid circular wall on Turtle Island." (Emphasis supplied)

In 1945 a concurrent resolution relative to this segment of the boundary line identical with the 1933 Ohio resolution was adopted by the Senate and House of the State of Michigan.[10]

In 1947 a House Concurrent Resolution[11] of the Michigan legislature rescinded the 1945 resolution and requested the Governor of the State of Michigan to confer with the Governor of the State of Ohio with a view to requesting the legislatures of the two states "to establish a boundary commission to investigate and to report to the legislatures the rights of the respective states within Lake Erie," copy of which is set forth in the appendix hereto.

As alleged in our complaint no definitive action has been taken by either state to settle this disputed segment of the boundary. That there exists uncertainty as to its location even on the part of officials of Ohio is indicated by the language in the first recital contained in the Ohio resolution of June 8, 1933.

Resolutions of the legislature of Michigan under its Constitution of 1908 are not binding upon the state and do not have the effect of law. In *Boyer-Campbell Co. v. Fry*, 271 Mich. 282, page 296, the Michigan Supreme Court ruled:

> "Legislative resolutions are not law, although they are entitled to respectful consideration (*Becker v. Detroit Savings Bank*, 269 Mich. 432)."

The most that can be said for the resolutions passed by the legislatures of both states is that they express the un-

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[10] 1945 House Journal pp. 591, 807, 1945 Senate Journal pp. 291, 619

[11] 1947 House Journal pp. 957, 1170, 1947 Senate Journal pp. 971, 1125

certainty which exists as to the proper construction of the congressional acts of 1836 pertaining to the Lake Erie segment of the boundary.

Even if these two states had adopted identical acts with respect to the location of the Lake Erie segment of the boundary amounting to a compact, such compact would not have been valid unless and until approved by the Congress of the United States pursuant to Article I, Sec. 10, Clause 3 of the Federal Constitution providing:

> "No State shall, without the Consent of Congress, * * * *enter into any Agreement or Compact* with another State, * * *." (Emphasis supplied)

Boundaries between states can have serious political consequences and any settlement of their location should be submitted to the Congress for its scrutiny and approval. Otherwise, states could swap territory at will and bring about considerable realignment of the political structure not only of the states involved but also of the Congress itself and the federal government.

These implications of the compact consent clause in the federal constitution were set forth with eloquence by this court in the early case of the *State of Rhode Island v. State of Massachusetts*, 12 Pet. (37 US) 657. Unless the operative effects of this clause to boundary agreements or compacts between states were made applicable, the court stated at pages 725 and 726:

> "* * * it would render the clause a perfect nullity for all practical purposes; especially the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts. Not to prevent the states from settling their own boundaries, so far

as merely affected their relations to each other, but to guard against the derangement of their federal relations with the other states of the Union and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure."

Following the decisions of this court in *Michigan v. Wisconsin*, 272 US 398, and *Wisconsin v. Michigan*, 297 US 547, involving a dispute regarding the location of certain segments of the boundary between these two states, the states of Michigan, Wisconsin and Minnesota entered into a compact which defined and established other segments of their boundaires in Lake Michigan and Lake Superior by the passage of identical acts. This compact received the approval of Congress June 30, 1948, PL 844, Chap. 757, 62 Stat. 1152.

The Location of the Northerly Cape of the Maumee Uncertain.

The most northerly cape of the Maumee (Miami) bay called for in the boundary description as it existed in 1836 has long since been eroded by the waters of Lake Erie. The geographical location and contour of this cape as it then existed involve matters of proof. The description does not specify the point on this cape to which the line from the southerly extreme of Lake Michigan is to be run. This is a question of congressional intent and requires legal construction and interpretation of this call in the description.

Power of the Court to Decide Boundary Cases.

That this court has jurisdiction under the judiciary clause of the United States Constitution to entertain suits

between states involving their boundaries was firmly established in *State of Rhode Island v. State of Massachusetts*, supra.

It is the position of the Attorney General of the State of Michigan that a genuine dispute exists between these states with respect to the true location of the Lake Erie segment of their boundary, a dispute which this court should decide. Efforts made by officials of these two states to settle this boundary dispute have failed. The terms of the congressional acts describing the northern boundary of the State of Ohio are couched in such general and vague language that their true meaning and intent are not ascertainable from the acts themselves. It is apparent from the history of this boundary, as we have sketched it, that the Lake Erie segment cannot be determined except upon a thorough investigation of all of the legislative history preceding and succeeding the adoption of the description of this boundary by the Congress.

Thus, recourse must be had to the constitutional powers of this court to hear and examine all the evidence and facts which may be presented by both states and under accepted legal principles construe the language which the Congress wrote into the various acts it enacted and render a definitive and binding decision which will put the question to rest for all time.

CONCLUSION

After a painstaking research and investigation, the State of Michigan genuinely believes that the real and true intent of Congress in 1836 was that the Lake Erie segment of the boundary between these two states should be a direct extension of Talcott's line to the international boundary.

Officials of the State of Ohio dispute this contention and now insist that this line should be deflected at 45° beginning at some point on the north cape of Maumee bay, the location of which cape and point are not presently known.

As is set forth in the complaint, the Attorney General of the State of Michigan requested the Governor of Ohio, the Honorable James A. Rhodes, to initiate steps toward forming a joint commission which would be empowered to make a settlement of this dispute. The Governor of Ohio responded by suggesting that the State of Michigan "petition the United States Supreme Court for a declaratory judgment on the matter."

The purpose of this brief is to show that a real and genuine dispute exists between these states and that the court should permit the State of Michigan to file its complaint so that the whole question be heard and decided with finality by this court.

Therefore, the Attorney General of the State of Michigan requests that the motion for leave to file this complaint be granted.

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Dated: ~~October 31, 1966~~
November 21, 1966

APPENDIX

A Concurrent Resolution Relative To The Boundary Line Between The States of Ohio and Michigan In Lake Erie Adopted During The 1947 Session Of The Michigan Legislature.

Whereas, In the 1945 regular session of the legislature of Michigan adopted Senate Concurrent Resolution No. 15 relative to the boundary line between the two states of Ohio and Michigan in Lake Erie; and

Whereas, Said concurrent resolution was presented to the legislature as a part of a proposal to determine the area of the entire state by inclusion of water areas within the total and without any other significance; and

Whereas, Upon subsequent investigation it became apparent that an area of about 70 square miles in Lake Erie was involved in the matter then presented and some question as to the jurisdiction over said water existed between the state of Ohio and the state of Michigan; and

Whereas, The particular area in question became a matter of dispute because of early surveys and maps purporting to determine the boundary line between the states in Lake Erie and showing for a great many years that the said boundary ran from a terminus in Lake Erie from a nonexistent boundary marker, which was formerly Grassy Point, to a turning point in the international boundary line between the United States and Canada, said line being at an angle more acute than 45 degrees; and

Whereas, The state of Ohio, by a concurrent resolution adopted several years ago attempted to resolve the stated

uncertainty concerning the boundary line by adopting a point on Turtle Island in Lake Erie as a basis for a line at 45° to intersect the land boundary line between the states and to intersect the international boundary line thereby conforming more closely to the language of the original and enabling acts and the constitutional provisions regarding the boundary line between the two states; and

Whereas, It is apparent that for many years the state of Michigan has exercised jurisdiction over the area in question and may have established by adverse possession and by consent and acquiescence of the state of Ohio a good title thereto; and

Whereas, Since the action of the two legislatures by concurrent resolution is not sufficient in the law governing the relationship of States to convey title or change boundary line, no settlement of any such dispute can be reached by such method; and

Whereas, If a settlement is to be reached it will, of necessity, require statutory enactment by the two states and should be the subject matter of an investigation by a joint boundary commission; now therefore be it

Resolved by the House of Representatives (the Senate concurring), That the State of Michigan nor any rights of said state concerning the boundary line in Lake Erie between the state of Ohio and the state of Michigan were not affected by the adoption of Senate Concurrent Resolution No. 15 of the 1945 session of the Michigan legislature; and be it further

Resolved, That insofar as said concurrent resolution No. 15 may in any manner be interpreted as determinative of the position of the state of Michigan with regard to the

said boundary in Lake Erie, said concurrent resolution is hereby rescinded; and be it further

Resolved, That the Governor of the state of Michigan is hereby requested to confer with the Governor of the state of Ohio concerning the subject matter hereof with a view to requesting the legislatures to establish a boundary commission to investigate and to report to the legislatures the rights of the respective states within Lake Erie; and be it further

Resolved, That a copy of this concurrent resolution be sent to the Governor of this state.

FILED
MAR 30 1957
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 20, Original.

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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INDEX

atement 1
rgument 3
onclusion 13
ppended Map ..... Inside Back Cover

TABLE OF AUTHORITIES

Cases.

yers v. Watson, 137 U.S. 584 13
randt v. Ogden, 1 Johns. R. (N.Y.) 156 7
hinoweth v. Haskell, 28 U.S. (3 Pet.) 92 8
urrier v. Nelson, 96 Cal. 505, 31 Pac. 531 7
E. McCalla Co. v. Sleeper, 105 Cal. App. 562, 228 Pac. 146 7
agan v. Campbell, 8 Porter's Rep. (Ala.) 9 7
olden v. Alexander, 82 S.C. 441, 62 S. E. 1108 ..... 7, 8
win v. Towne, 42 Cal. 326 7
ckson v. Reeves, 3 Cai. R. (N.Y.) 293 7
oore v. Harris, 2 Ky. Dec. 18 7
mmons Creek Coal Co. v. Doran, 142 U.S. 417 13
ermont Marble Co. v. Eastman, 91 Vt. 425, 101 Atl. 151 7

Statutes & Resolutions.

Stat. 49 (1836) 2, 3, 4, 5, 6, 8, 9, 12
Stat. 56-57 (1836) 2, 3, 4, 5, 6, 8, 9, 12
Stat. 144 (1837) 4
5 Ohio Laws 685 (1933) 9, 10, 11, 12
45 House Journal (Mich.) 591, 807 11
45 Senate Journal (Mich.) 291, 619 11

1947 House Journal (Mich.) 957, 1170 11
1947 Senate Journal (Mich.) 971, 1125 11

Miscellaneous.

"Maumee Bay surveyed under the direction of Capt. W. G. Williams, 1844", Map P 45, GSA—National Archives 10
Professional Paper No. 24, Report upon The Primary Triangulation of the United States Lake Survey (1882) 10
Sherman, Ohio Cooperative Topographic Survey, Vol. I (1916) 9
Sherman, Ohio Cooperative Topographic Survey, Vol. IV (1933) 9
Webster, American Dictionary of the English Language (1828) 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 30, Original.

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT

The State of Michigan has filed with this Court a "Motion For Leave To File Complaint" (hereinafter referred to as the "Motion For Leave"), a "Complaint" (hereinafter referred to as the "Complaint"), and a "Brief Of The State Of Michigan In Support Of Motion For Leave To File Complaint" (hereinafter referred to as the "Brief"), all of which pertain to an alleged controversy between Michigan and the State of Ohio concerning the location of the boundary between said states in Lake Erie. In this brief, it is the sole purpose of the State of Ohio to show the Court that there can realistically be no dispute or controversy concerning the location of the Lake Erie portion of the boundary between these two states, and hence that this Court should deny Michigan's Motion For Leave.

It is not Ohio's position that this Court lacks jurisdiction in a case brought by one state against another to ascertain and establish a boundary between them. However, when the facts presented to the Court in the initial documents filed in an original action exhibit no actual dispute or controversy or when such facts would have to be unreasonably interpreted to render the relief sought by the plaintiff, the Court should utilize its screening authority to deny the plaintiff's motion for leave to file its complaint. It is Ohio's position that the instant case falls within this category of objectionable suits.

To facilitate a thorough understanding of Ohio's position, it is first necessary to distill from the aforesaid items filed by Michigan what they seek to have this Court do.

Initially, it is clear that Michigan is not contesting or calling into question the land portion of the boundary between the two states. Complaint, pp. 2, 6-7. Consequently, the only area of their concern is the Lake Erie portion of the common boundary.

Regarding the lake portion of the boundary, Michigan appears to have two goals, as indicated by their Complaint at pages 4-5, and 12, to-wit: 1) a declaration from this Court establishing the Lake Erie portion of the boundary line between Ohio and Michigan as a straight easterly continuation of the land boundary from the last marker on the land boundary line (Post No. 71) to the international boundary line; 2) a declaration from this Court determining the location of the most northerly cape of the Maumee (Miami) bay to which the Congressional acts establishing the boundary between these two states referred.[1]

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[1] 5 Stat. 49 (1836); and 5 Stat. 56-57 (1836).

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The State of Ohio in this brief will affirmatively show to this Court that the aforesaid determinations sought by the State of Michigan are not in fact necessary as these matters can be, and have been determined with such certainty as to not be reasonably subject to either discussion or debate, and much less judicial inquiry.

ARGUMENT

It is now, and has been, Ohio's claim that the portion of its northern boundary in Lake Erie was clearly and unambiguously settled and established by Congress in the year 1836. See 5 Stat. 49; and 5 Stat. 56-57.

Ohio claims that at the most northerly cape of the Maumee (Miami) bay, the northern lake boundary line of Ohio departs from the direction of the land boundary line and begins the course N 45 degrees E which course is followed the distance from said cape to the international boundary line.

Ohio further claims that although the cape and the monument marking the most northerly cape of the Maumee (Miami) bay have been washed away and lost, that that point can be readily re-established and certainly ascertained by utilizing a point known to have intersected the line departing from said most northerly cape on the N 45 degrees E course and reversing that course by running a line on the course S 45 degrees W from said known point until it intersects the projection of the known and established land boundary line.

Ohio's claimed boundary and the point representing the most northerly cape of the Maumee (Miami) bay, determined as aforesaid, are graphically exhibited by the map which is appended to this brief.

A. At The Most Northerly Cape Of The Maumee (Miami) Bay, The Northerly Boundary Line Of The State Of Ohio In Lake Erie Departs From The Direction Of The Land Boundary Line And Begins The Course North 45 Degrees East, Which Course Is Followed The Distance From Said Cape To The International Boundary Line.

The Congressional acts establishing the northern boundary of the State of Ohio were passed in the year 1836, and are found in 5 Stat. 49, and 5 Stat. 56-57. It is Ohio's firm conviction and contention that these two acts can leave no doubt as to the position of its northern boundary in Lake Erie; consequently, both of said statutes will be examined with particularity.

On June 15, 1836, Congress passed an act entitled "An Act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed,"[2] which act appears in 5 Stat. 49, and provides in pertinent part:

> "That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, *to the most northerly cape of the Maumee (Miami) bay*, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; *and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie;* and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania." (Emphasis added.)

[2] The conditions expressed in 5 Stat. 49 (1836), appear in section 2 thereof and provide that Michigan can gain statehood only upon express condition that she consent to and accept the boundaries set forth in the act, among which is that her southern boundary common with Ohio be the boundary line set forth in the first section of the act as Ohio's northern boundary. Michigan did consent to and accept these boundaries. See 5 Stat. 144 (1837).

The area of examination herein is the call in the description "and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie", with scrutiny of the words "from" and "northeast".

On June 23, 1836, eight days after the passage of 5 Stat. 49, *supra*, Congress passed an act entitled "An Act to settle and establish the northern boundary line of the State of Ohio," which act is found in 5 Stat. 56-57. The pertinent portion of this statute reads:

> "That the northern boundary of the State of Ohio shall be established by and extend to, a direct line running from the southern extremity of Lake Michigan *to the most northerly cape of the Miami bay; thence, northeast, to the northern boundary line of the United States;* thence, with said line, to the Pennsylvania line." (Emphasis added.)

The call in this act which pertains to the question at hand is "thence, northeast, to the northern boundary line of the United States", with special analysis of the words "thence" and "northeast".

Both of the aforesaid acts describe the same line, and in each of them Congress employed plain, clear and unambiguous languge to do so. The line described in both of these acts that forms the Lake Erie portion of Ohio's northern boundary, is a line departing from the land boundary line at the north cape of Maumee (Miami) bay on a course N 45 degrees E, which course is followed the distance from said cape to the international boundary line.

Consider initially the actual words utilized by Congress in each of these acts in light of the meaning of those words at the time they were used. In 5 Stat. 49 (1836), Congress first describes the land boundary line, which description terminates at the cape, and Congress then recites the next

call as "*from* the said north cape". The preposition "from" is described in the dictionary of the day as follows:

> "The sense of *from* may be expressed by the noun *distance*, or by the adjective *distant*, or by the participles, *departing*, removing to a *distance* . . ."
> Webster, American Dictionary of the English Language (1828).

Similarly, in 5 Stat. 56-57 (1836), Congress sets forth the land boundary call to the cape, and then the next call recited is "thence, northeast". The word "thence" was defined at the time of its usage as: "1. From that place." Webster, American Dictionary of the English Language (1828).

It is evident from the foregoing that the call following the one describing the land boundary line is a call departing from said land boundary line at its terminus, the cape.

Buttressing the conclusion of departure, and more importantly describing the course of the departing line, is the word "northeast", which appears in both of said statutes following the words of departure discussed above. Again turning first to the plain meaning of this word, "northeast" had but one defined meaning at the time 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), were passed, to wit: "The point between the north and east, at an equal distance from each." Webster, American Dictionary of the English Language (1828). Hence, the use of this word in defining the northern boundary of Ohio not only reaffirms the fact that the lake boundary line departs from the land boundary line at the cape, but gives the course of the lake boundary line, which given course is the point equal distance from north and east, or in other words, N 45 degrees E.

Early and continued judicial interpretation of boundary descriptions containing a course of a line going to a com-

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pass position, further substantiates the fact that the call "northeast" in the aforesaid statutes means N 45 degrees E.

There are a plethora of cases interpreting a description employing a call to one of the cardinal points of the compass (North, East, South, West), to mean a line running directly in that course, unless qualified or controlled by other words in the description. See, *e.g., Hagan v. Campbell,* 8 Porter's Rep. (Ala.) 9, 31 (1838); *Vermont Marble Co. v. Eastman,* 91 Vt. 425, 443, 101 Atl. 151, 158 (1917); *E. E. McCalla Co. v. Sleeper,* 105 Cal. App. 562, 569, 288 Pac. 146, 148 (Ct. App. 1930). Even when the cardinal point course is qualified by the suffix "ly" or "ward" (e.g. northerly, southward), the courts have consistently interpreted the course to be a line directly to the cardinal point (e.g. due north, due south), unless controlled by other calls. See, *e.g., Jackson v. Reeves,* 3 Cai. R. (N.Y.) 293, 299 (Sup. Ct. 1805); *Brandt v. Ogden,* 1 Johns. R. (N.Y.) 156, 158 (Sup. Ct. 1806); *Currier v. Nelson,* 96 Cal. 505, 508, 31 Pac. 531, 532 (1892).

Although an exhaustive search has revealed but a few cases defining the course of a line contained in a boundary description to a compass point other than a cardinal point, those few cases are in accord with the cardinal point cases (and each other) in holding that a line following such a call must run directly in that course, unless a different location is required by other words in the description. See, *Moore v. Harris,* 2 Ky. Dec. 18 (1801); *Irwin v. Towne,* 42 Cal. 326, 334 (1871); *Holden v. Alexander,* 82 S.C. 441, 454, 62 S.E. 1108, 1112 (1908). The most succinct statement of this proposition is contained in the case of *Holden v. Alexander, supra*:

> "While the course 'southwest' called for in the deed without stating degrees is unusual, and possibly might

> not have been intended to mean an exact course, yet *'southwest means a course equally diverging from south and west, or south 45 degrees west;'* and when used in a deed a different meaning cannot be given to it by parol testimony." (Emphasis added.)

Neither of the descriptions here in question contain any words or other calls which would qualify or change the course "northeast" to something other than due northeast, N 45 degrees E.

In each of the aforesaid statutes, Congress utilized plain, clear and unambiguous language in describing the northern boundary line of the State of Ohio in Lake Erie. In both of said statutes Congress described the line in question as a line departing from the direction of the land boundary line at the most northerly cape of the Maumee (Miami) bay and beginning at the cape the course N 45 degrees E, which course is followed the distance from said cape to the international boundary line. The course "northeast" and the distance from the cape to the international boundary line are the only description of the Lake Erie portion of Ohio's northern boundary line given in 5 Stat. 49 (1836) and 5 Stat. 56-57 (1836). As was stated by Chief Justice Marshall in *Chinoweth v. Haskell*, 28 U.S. (3 Pet.) 92, 96 (1830):

> "The *courses and distances* are less certain and less permanent guides to the land actually surveyed and granted than natural and fixed objects on the ground; but they *are guides to some extent, and, in the absence of all others, must govern us.*" (Emphasis added.)

B. The Most Northerly Cape Of The Maumee (Miami) Bay Can Be Readily Re-established And Certainly Ascertained By Taking A Point Known To Have Intersected The Line Departing From Said Cape On The Course N 45 Degrees E Therefrom, And Reversing That Course By Running A Line On The Course S 45 De-

grees W From Said Known Point Until The Reverse Line Intersects The Projection Of The Known And Established Land Boundary Line.

At the outset of this facet of the State of Ohio's argument, it is helpful to refer to known propositions concerning the most northerly cape of Maumee (Miami) bay. They are as follows:

1. The most northerly cape of the Maumee (Miami) bay referred to in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), was originally located and monumented in the year 1817 by a surveyor named Harris; however, this monument and said cape were washed away and lost.[3]
2. The states of Ohio and Michigan jointly resurveyed and marked the land boundary between them, which resurvey terminated at Post No. 71, rather than said cape, due to the fact that the original cape monument could not be found.[4]
3. Post No. 71, which marks the easterly extreme of the jointly resurveyed land boundary line, is basically located near the edge of the water in Maumee bay, and is, of course, readily located.[5]
4. From the preceding section of this brief, it is evident that at the most northerly cape of the Maumee (Miami) bay, as referred to in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), the northern boundary line of the State of Ohio in Lake Erie departs from the direction of the land boundary line and begins the course N 45 degrees E, which course is followed the distance from said cape to the international boundary line.

In addition to the foregoing propositions, it is known that while the most northerly cape of the Maumee (Miami) bay and the monument set thereon by Harris were still in ex-

---

[3] 115 Ohio Laws 685 (1933); Sherman, Ohio Cooperative Topographic Survey, Vol. IV (1933), p. 41.

[4] See Sherman, "Report of Engineer", Ohio Cooperative Topographic Survey, Vol. I (1916).

[5] See, *e.g.*, Sherman, *supra*, Vol. I, pp. 54-55, and map No. 9.

istence, a line run from that monumented point on the course N 45 degrees E to the international boundary line ran through a small island in Lake Erie named Turtle Island, the location of which island is fixed and known.[6]

Although the fact that the line on the course N 45 degrees E from said cape point to the international boundary line passes through Turtle Island may be established by a review of old Lake Erie maps and charts,[7] in the interest of brevity Ohio will refer and defer to obviously long-considered and thorough legislative acts considering this proposition and utilize the fruits of the legislator's labors.

Senate Joint Resolution No. 25, adopted by the Ohio General Assembly in 1933, provides as follows:

> *"Be it resolved by the General Assembly of the State of Ohio:*
>
> "WHEREAS, Uncertainty has existed concerning the boundary between the states of Ohio and Michigan in Lake Erie, due to the omission of this portion of the boundary on some maps and its incorrect position on others, and
>
> "WHEREAS, The easterly terminal monument of the Ohio-Michigan land-boundary line set in 1817 by Andrew Harris has disappeared, due to the the washing away of North Cape at the place where the monument originally stood, and
>
> "WHEREAS, The earliest United States lake survey charts of the region show that the aforesaid terminal monument was at or near the intersection of the land-line between the two states and a line drawn south forty-five degrees west (S 45° W) *through*

[6] Professional Paper No. 24, Report upon The Primary Triangulation of the United States Lake Survey (1882), p. 799.

[7] See, *e.g.*, "Maumee Bay surveyed under the direction of Capt. W. G. Williams, 1844", Map P 45, GSA—National Archives. Referring to it as such, this map shows the boundary line between Ohio and Michigan as beginning a course of N 45 degrees E at the point described on the map as "North Cape". The boundary line shown on the map following the course N 45 degrees E from "North Cape", bisects Turtle Island, and is shown as either passing through the lighthouse on this island, or very near to it. The map shows Turtle Island to have a total area of less than an acre.

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the center of Turtle island which is located at latitude 41° 45' 08.8" and longitude 83° 23' 28.8" according to primary triangulation of the United States lake survey published in 1882, and

"WHEREAS, The *center part of the island was preserved by a circular concrete sea wall about 190 feet in diameter by the U.S. lighthouse service, which wall is still standing*; therefore,

"*Be it resolved by the General Assembly of the State of Ohio,* That with the concurrence of the legislature of Michigan, the boundary line between the two states in Lake Erie shall be a *line passing through the center of the aforesaid circular wall* and bearing south forty-five degrees west (S 45° W) therefrom until it shall intersect the land-line between the two states as marked and monumented by them in 1915; and that from the aforesaid center of the circular wall the boundary in Lake Erie shall extend north forty-five degrees east (N 45° E) until it shall intersect the international boundary between the United States and Canada, it being understood that all bearings herein referred to shall be measured from a true meridian through the center of the aforesaid circular wall on Turtle island."

115 Ohio Laws 685 (Emphasis added in part.)

After twelve years, the Legislature of the State of Michigan passed a resolution identical with the above-quoted act of the Ohio General Assembly. See 1945 House Journal (Mich.) 591, 807; and 1945 Senate Journal (Mich.) 291, 619.

In the year 1947, the Michigan Legislature supposedly rescinded the aforesaid resolution passed in 1945.[8] At this stage of the proceedings in the instant case, examination of the effect of this rescission will not be made. Suffice it to say that even in view of the 1947 Michigan resolution, it is obvious that both state legislatures considered that a line following the course N 45 degrees E from the most northerly cape of the Maumee (Miami) bay when that point was

[8] 1947 House Journal (Mich.) 957, 1170; and 1947 Senate Journal (Mich.) 971, 1128.

known, passed through Turtle Island. A thorough review of the 1947 Michigan rescission resolution does not indicate that Michigan took issue with this proposition, as is evident by the following language therefrom:

> "Whereas, The state of Ohio, by a concurrrent resolution adopted several years ago attempted to resolve the stated uncertainty concerning the boundary line by adopting a point on Turtle Island in Lake Erie as a basis for a line at 45° to intersect the land boundary line between the states and to intersect the international boundary line *thereby conforming more closely to the language of the original and enabling acts and the constitutional provisions regarding the boundary line between the two states*;" Brief, pp. 17-18 (Emphasis added.)

From the foregoing legislative pronouncements, it is apparent that in their attempt to re-establish the lake boundary line between them called for in 5 Stat. 49 (1836), and 5 Stat. 56-57 (1836), the legislatures in both states discovered that when the point of the most northerly cape of the Maumee (Miami) bay was known and monumented, a line run from the known point on a course N 45 degrees E passed through Turtle Island at the point referred to in the previous quote from the joint resolution of the Ohio General Assembly. See 115 Ohio Laws, *supra.*

In summary, then, the following are the "knowns": 1) the last course of the land line at Post No. 71; 2) the course of the lake boundary line from the most northerly cape of the Maumee (Miami) bay to the international boundary line is N 45 degrees E; 3) the course last referred to passes through Turtle Island; 4) the exact location of Turtle Island; 5) the point at which the lake boundary line passed through Turtle Island. Placing these five known quantities in an equation, the unknown, the point of the most north-

erly cape of the Maumee (Miami) bay, can be indisputedly ascertained.

It is a well established surveying principle that a course may be reversed to establish an unknown point. This principle has also been recognized by this Court. See, *e.g., Ayers v. Watson*, 137 U.S. 584, 590 (1891); *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 432 (1892). Thus, by reversing the known call of N 45 degrees E to S 45 degrees W, and running a line on this latter "reversed" course from the known position of Turtle Island to the point of intersection of that line with a projection of the land boundary line from Post No. 71, the unknown, the most northerly cape of the Maumee (Miami) bay, is determined. The map appended to this brief graphically depicts the procedure outlined above.

CONCLUSION

It is the State of Ohio's strong contention that the boundary line betwen it and the State of Michigan in Lake Erie is so certain as to not require judicial inquiry. Ohio feels that in view of the foregoing analysis of that portion of her common boundary with Michigan which Michigan seeks to attack in this suit, it is apparent that there is no justiciable dispute or controversy. Therefore, the State of Ohio respectfully urges this Court to deny Michigan's Motion For Leave.

Although we firmly believe in the position that we have presented in this brief, we have a somewhat ambivalent attitude toward this lawsuit in the respect that if the State of Michigan will not accept what we feel is obvious, it would be advantageous to us to have the matter resolved by this Court.

In the event that this Court should grant Michigan's Motion For Leave, it is our feeling that this case can be

adequately and fairly presented as to both states by the filing of briefs with this Court rather than by the more lengthy and expensive procedure of appointing a special master as Michigan prays for in her complaint. We respectfully suggest that this procedure be followed.

Respectfully submitted,

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March, 1967.



OWING FOLDOUTS/EXHIBITS ARE TOO LARGE TO FILM

FILED
JUN 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant,

ANSWER

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IN THE

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No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

vs.

STATE OF OHIO,

Defendant,

ANSWER

The State of Ohio, by its Attorney General, William B. Saxbe, in answer to the Complaint of the State of Michigan, admits:

1. That the boundary between Ohio and Michigan was established by Act of The Congress of the United States in 1836 by 5 Stat. 49 being titled "An Act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the condition therein expressed";

2. That the northern boundary of Ohio was settled and established by Act of The Congress of the United States in 1836 by 5 Stat. 56, 57 being titled "An Act to settle and establish the northern boundary line of the State of Ohio";

3. That the State of Ohio has exercised jurisdiction, control and ownership of the triangular area of Lake Erie described by the State of Michigan in its Complaint at page 9, No. 2 and has subdivided the area for the purposes of issuing leases.

Further answering, the State of Ohio denies:

1. That no understanding resolving the location of the boundary line has been arrived at by any official action;

2. That the projected extension of the land boundary line on the same course, from the north cape of the Maumee (Miami) Bay to the international boundary in Lake Erie between the United States and Canada which was described on the reproduction of the general map which accompanied Captain Talcott's report of December 14, 1835, and which was attached to the Complaint, describes the boundary between the States of Ohio and Michigan in Lake Erie;

3. That the boundary between the States of Ohio and Michigan claimed by the State of Ohio is contrary to the intent of Congress in the enactment of the aforesaid acts, 5 Stat. 49 and 5 Stat. 56, 57, *supra*, establishing and settling such boundary;

4. That any arrests made by the State of Ohio in the triangular area of Lake Erie described by the State of Michigan in its Complaint at page 9, No. 2, are unlawful for the reason that they were made by the State of Ohio;

5. That the exercise of jurisdiction, control and ownership of the triangular area described by the State of Michigan in its Complaint at page 9, No. 2 and the subdivision of that area for the purposes of issuing leases is contrary to any right of the State of Michigan;

6. That it was the intent of Congress in the enactment of 5 Stat. 49 and 5 Stat. 56, 57, *supra*, that the northern

boundary of the State of Ohio was to be an extension of the land boundary line between the two States.

Further answering, the State of Ohio says:

1. That the boundary line between the States of Ohio and Michigan from the most northerly cape of the Maumee (Miami) Bay to the international boundary in Lake Erie between the United States and Canada departs from the direction of the land boundary line between the two states and begins the course North 45° East from the most northerly cape of Maumee (Miami) Bay to the international boundary in Lake Erie between the United States and Canada;

2. That the location of the most northerly cape of the Maumee (Miami) Bay as such point was referred to in 5 Stat. 49, and 5 Stat. 56, 57, *supra*, may be established by extending the land boundary line to a point at which it would intersect a line run South 45° West from the center of a circular concrete sea wall in the center of Turtle Island which is located approximately at latitude 41° 45′ 08.8″ and longitude 83° 23′ 28.8″ according to primary triangulation of the United States lake survey published in 1882;

3. That the State of Michigan has acquiesced in the exercise of jurisdiction, control and ownership of the State of Ohio to the triangular area of Lake Erie described by the State of Michigan in its Complaint at page 9, No. 2 and has acquiesced in the exercise of jurisdiction, control and ownership of such area.

WHEREFORE, having answered, the State of Ohio prays that this Court:

1. Establish by its order that the boundary between the States of Ohio and Michigan from the most northerly cape of the Maumee (Miami) Bay to the international boundary in Lake Erie between the United States and Canada is a

line run from the most northerly cape of the Maumee (Miami) Bay on a course North 45° East to such international boundary;

2. Establish by its order that the most northerly cape of the Maumee (Miami) Bay is the point at which an extension of the land boundary line would intersect a line run South 45° West from the center of a circular concrete sea wall in the center of Turtle Island which is located approximately at latitude 41° 45′ 08.8″ and longitude 83° 23′ 28.8″ according to primary triangulation of the United States lake survey published in 1882.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1970

No. 30, Original

Supreme Court, U. S.
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FILED: Nov. 9, 1972

STATE OF MICHIGAN, *Plaintiff*

v.

STATE OF OHIO, *Defendant*

REPORT OF ALBERT B. MARIS, *Special Master*

June 30, 1971

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

INDEX

	Page
Findings of Fact	5
Discussion	25
Introductory Statement	25
Background—The Ohio-Michigan Land Boundary	25
The Ohio-Michigan Boundary in Lake Erie	27
The Recovery of the 1836 Location of the North Cape of Maumee Bay	31
Conclusions	34
Recommended Decree	34
Appendix "A"	36
Appendix "B"	37
Appendix "C"	38
Appendix "D"	39
Appendix "E"	40

IN THE

Supreme Court of the United States

October Term, 1970 — No. 30, Original

STATE OF MICHIGAN, *Plaintiff*

v.

STATE OF OHIO, *Defendant*

REPORT OF ALBERT B. MARIS, *Special Master*

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The present controversy involves the location of that portion of the boundary line between the States of Ohio and Michigan which runs through the waters of Lake Erie to the eastward of a point which was the location of the most northerly cape of Maumee Bay in 1836. That cape, which has long since eroded to the north, was the eastern terminus of the land boundary between these states. Because of the erosion of the north cape of Maumee Bay the controversy also involves the precise position which that cape occupied in 1836.

The boundary between these states was established by the Congress by the Act of June 15, 1836, 5 Stat. 49, which provided for the admission of the State of Michigan into the Union. That Act provided "That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extrem-

ity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said mentioned line, to its intersection with the western line of the State of Pennsylvania." The people of the State of Michigan, through the vote of a convention of elected delegates on December 15, 1836, assented to the boundary line with the State of Ohio established by the Act of June 15, 1836, an assent which was required by that Act as a condition of admission to the Union. Nonetheless, the two states do not agree upon the meaning and application of the words "from the said north cape of the said bay, northeast" as used in the Act of 1836 to indicate the bearing of the boundary through the waters of Lake Erie eastward of the north cape of Maumee Bay. The State of Michigan contends that "from the said north cape . . . , northeast" as used in this Act should be construed to mean in a northeasterly direction continuing on the same course or bearing as the land portion of the boundary line from the Indiana line to the north cape of Maumee Bay. The State of Ohio, on the other hand, contends that "northeast" as used in the Act of 1836 means due northeast, i.e., North 45° East. The controversy thus involves the question of jurisdiction over a triangular segment of Lake Erie waters and lake bed said to contain about 200 square miles. It also necessarily involves, as I have above indicated, the precise location which was occupied by the most northerly cape of Maumee Bay in 1836 before it eroded to its present more northerly location.

On April 17, 1967 leave was granted by the Court to the State of Michigan to file its complaint against the State of Ohio, 386 U.S. 1001, and on June 16, 1967 the State of Ohio filed its answer to the complaint. The complaint alleges that the boundary line in Lake Erie between the State of Michigan and the State of Ohio from Post 71, the

most easterly existing land boundary monument, consists of a direct line from Post 71 projected across Maumee Bay to the position in 1836 of the most northerly cape of Maumee Bay and extends thence, on a continuation of the original course from the most southerly extreme of Lake Michigan through Lake Erie to an intersection with the international boundary in that lake and it seeks a declaration and determination to that effect. The answer denies that the boundary line contended for by the State of Michigan is the true line and asks the Court to establish that the boundary between the States of Ohio and Michigan from the most northerly cape of Maumee (Miami) Bay to the international boundary in Lake Erie between the United States and Canada is a line run from the most northerly cape of Maumee (Miami) Bay on a course North 45° East to the international boundary line. Both complaint and answer ask for a determination of the precise location of the most northerly cape of Maumee Bay as it existed in 1836. The complaint, in addition, asks for a declaration confirming the jurisdiction and sovereignty of the State of Michigan to that part of Lake Erie lying northerly of the boundary line which it claims, and also confirming its ownership of the bottom lands of Lake Erie lying northerly of that line, including all minerals and other natural resources appertaining thereto.

Issue having thus been joined, the Court on May 8, 1967, appointed the undersigned as special master with authority to summon witnesses, issue subpoenas, take such evidence as may be introduced and such as he may deem it necessary to call for, and to submit such reports as he may deem appropriate. 386 U.S. 1029. Pursuant to the appointment, I held a prehearing conference with counsel in Philadelphia on September 20, 1967 and formal hearings to receive evidence in Toledo on October 18, 1967, in Philadelphia on October 18, 1968 and again in Toledo on June 22, 1970. Oral argument by counsel on proposed findings and conclusions took place in Philadelphia on April 1, 1971. I also, in the company of counsel, inspected

the locations of Posts 70 and 71 near the eastern end of the Ohio-Michigan land boundary line and visited Turtle Island off Maumee Bay.

From the evidence, both oral and documentary, received at the hearings and after consideration of matters of which judicial notice may be taken, I have made the findings of fact which follow:

FINDINGS OF FACT

1. The States of Ohio and Michigan were each formed from parts of the Northwest Territory which consisted of lands north of the River Ohio and west of the State of Pennsylvania to the River Mississippi and bounded on the north by the boundary line between the United States and the former Province of Upper Canada. Upon recommendation of the Continental Congress those states laying claim to this territory relinquished their claims and ceded the unappropriated lands to the United States. On October 10, 1780 the Continental Congress resolved that these unappropriated lands be settled and formed into distinct republican states, which should thereafter become members of the federal Union. Journals of the Continental Congress, vol. 18 (1780) page 915 (Washington, Government Printing Office, 1910).

2. The cession by the Commonwealth of Virginia of its territory northwest of the River Ohio to the United States on March 1, 1784 was made "upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty, miles square, or as near thereto as circumstances will admit". Hening's Statutes of Virginia, vol. 11 (1782-1784) page 572.

3. On July 7, 1786 the Continental Congress adopted the following resolution:

> "Whereas it appears, from the knowledge already obtained of the tract of Country lying Northwest of the river Ohio, that the laying it out and forming it into states of the Extent mentioned in the resolution of Congress of the 10th of October, 1780, and in one of the conditions contained in the cession of Virginia, will be productive of many and great inconveniences: That by such a division of the country, some of the new states will be deprived of the advantages of Navigation, some will be improperly inter-

sected by lakes, rivers and Mountains, and some will contain too great a proportion of barren unimprovable land, and of consequence will not for many years, if ever, have a sufficient number of inhabitants to form a respectable government, and entitle them to have a seat and voice in the federal council: And whereas in fixing the limits and dimensions of the new states, due attention ought to be paid to natural boundaries, and a variety of Circumstances which will be pointed out by a more perfect knowledge of the country, so as to provide for the future growth and prosperity of each state, as well as for the accommodation and security of the first adventurers. In order therefore that the ends of government may be attained, and that the states which shall be formed, may become a speedy and sure accession of strength to the Confederacy:

"*Resolved*, That it be, and it hereby is recommended to the legislature of Virginia, to take into consideration their Act of cession, and revise the same, so far as to empower the United States in Congress assembled, to make such a division of the territory of the United States lying Northerly and westerly of the river Ohio, into distinct republican states, not more than five nor less than three, as the situation of that country and future circumstances may require; which states shall hereafter become members of the federal Union, and have the same rights of sovereignty, freedom and independence as the original states, in conformity with the resolution of Congress of the 10th October, 1780." Journals of the Continental Congress, vol. 30 (1786) pages 393-394 (United States Government Printing Office, Washington, 1934).

4. On July 13, 1787 the Continental Congress enacted "An Ordinance for the government of the territory of the United States North West of the river Ohio," declaring as one of the Articles of the compact between the original

states and the people and future states in that territory the following:

"Article the Fifth. There shall be formed in the said territory, not less than three nor more than five States, and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The Western State in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash rivers, a direct line drawn from the Wabash and post Vincents due North to the territorial line between the United States and Canada, and by the said territorial line to the lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash, from post Vincents to the Ohio; by the Ohio, by a direct line drawn due North from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line; provided however, and it is further understood and declared, that the boundaries of these three States, shall be subject so far to be altered, that if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of lake Michigan; and whenever any of the said States shall have sixty thousand free Inhabitants therein, such State shall be admitted by its Delegates into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government, provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these Articles; and so far as it can be consistent with the general interest of

the Confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free Inhabitants in the State than sixty thousand." Journals of the Continental Congress, vol. 32 (1787) pages 342-343 (United States Government Printing Office, Washington, 1936).

5. By an Act of December 30, 1788 the Commonwealth of Virginia ratified and confirmed the fifth article of the Northwest Territory Ordinance of July 13, 1787 "any thing to the contrary, in the deed of cession of the said territory by this commonwealth to the United States, notwithstanding." Hening's Statutes of Virginia, vol. 12 (1785-1788) pages 780-781.

6. By section 1 of "An act to divide the territory of the United States northwest of the Ohio, into two separate governments," approved May 7, 1800, the Congress created the Indiana Territory out of that part of the Northwest Territory lying "to the westward of a line beginning at the Ohio, opposite to the mouth of Kentucky river, and running thence to Fort Recovery, and thence north until it shall intersect the territorial line between the United States and Canada." 2 Stat. 58-59.

7. On April 30, 1802 the Congress enacted "An Act to enable the people of the Eastern division of the territory northwest of the river Ohio to form a constitution and state government, and for the admission of such state into the Union," section 2 of which provided:

> "*And be it further enacted*, That the said state shall consist of all the territory included within the following boundaries, to wit: bounded on the east by the Pennsylvania line, on the south by the Ohio river, to the mouth of the Great Miami river, on the west by the line drawn due north from the mouth of the Great Miami, aforesaid, and on the north by an east and west line, drawn through the southerly extreme of Lake Michigan, running east after intersecting the due north line aforesaid, from the mouth of the Great

Miami, until it shall intersect Lake Erie, or the territorial line, and thence with the same through Lake Erie to the Pennsylvania line, aforesaid: *Provided*, that Congress shall be at liberty at any time hereafter, either to attach all the territory lying east of the line to be drawn due north from the mouth of the Miami, aforesaid, to the territorial line, and north of an east and west line drawn through the southerly extreme of Lake Michigan, running east as aforesaid to Lake Erie, to the aforesaid state, or dispose of it otherwise, in conformity to the fifth article of compact between the original states, and the people and states to be formed in the territory northwest of the river Ohio." 2 Stat. 173-174.

8. The constitution which was adopted by the State of Ohio on November 29, 1802 and thereafter submitted to the Congress declared in Article VII, section 6, that the limits and boundaries of the state were those prescribed in the Enabling Act of April 30, 1802, with the following proviso:

"*Provided always, and it is hereby fully understood and declared by this convention*, That if the southerly bend or extreme of Lake Michigan should extend so far south, that a line drawn due east from it should not intersect Lake Erie, or if it should intersect the said Lake Erie east of the mouth of the Miami River of the Lake, then, and in that case, with the assent of the Congress of the United States, the northern boundary of this State shall be established by, and extending to, a direct line, running from the southerly extremity of Lake Michigan to the most northerly cape of the Miami Bay, after intersecting the due-north line from the mouth of the Great Miami River as aforesaid; thence northeast to the territorial line, and by the said territorial line, to the Pennsylvania line." Thorpe, Federal and State Constitutions, vol. 5, page 290 (Washington, Government Printing Office, 1909).

9. By the Act of February 19, 1803, 2 Stat. 201, the Congress recognized that the State of Ohio had formed a constitution and state government pursuant to the Enabling Act of April 30, 1802, and had thereby become one of the United States of America. The Act of February 19, 1803 provided for the execution of the laws of the United States within the State of Ohio. It did not, however, in specific terms at that time approve or disapprove the northern boundary line contended for by Ohio as set out in the above quoted proviso to its constitution.

10. By section 1 of "An Act to divide the Indiana Territory into two separate governments", approved January 11, 1805, the Congress established Michigan Territory out of the northern part of the former Indiana Territory and defined its boundary as follows:

> "That from and after the thirtieth day of June next, all that part of the Indiana territory, which lies north of a line drawn east from the southerly bend or extreme of Lake Michigan, until it shall intersect Lake Erie, and east of a line drawn from the said southerly bend through the middle of said lake to its northern extremity, and thence due north to the northern boundary of the United States, shall, for the purpose of temporary government, constitute a separate territory, and be called Michigan." 2 Stat. 309.

11. On May 20, 1812, the Congress enacted "An Act to authorize the President of the United States to ascertain and designate certain boundaries", which provided, inter alia:

> ". . . That the surveyor general, under the direction of the President of the United States, be, and he is hereby authorized and required, (as soon as the consent of the Indians can be obtained,) to cause to be surveyed, marked and designated, so much of the western and northern boundaries of the state of Ohio, which have not already been ascertained, as divides said state from the territories of Indiana and Michi-

gan, agreeably to the boundaries as established by the act, entitled 'An act to enable the people of the eastern division of the territory northwest of the river Ohio to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and for other purposes,' passed April thirtieth, one thousand eight hundred and two; and to cause to be made a plat or plan of so much of the boundary line as runs from the southerly extreme of Lake Michigan to Lake Erie, particularly noting the place where the said line intersects the margin of said lake, and to return the same when made to Congress . . ." 2 Stat. 741.

12. The surveys required by the Act of May 20, 1812 were not made immediately but Deputy Surveyor Benjamin Hough, about 1815, made solar observations to determine the latitude of the north cape of Miami Bay and transmitted the results to Surveyor General Edward Tiffin. These observations were made with a sextant and the latitude was found to be 41° 51′ 50″ North.

13. The Congress, in an appropriation act, approved April 16, 1816, 3 Stat. 277, 283, reauthorized the surveys which it had directed in 1812.

14. On August 22, 1816, at the direction of the President, Commissioner Josiah Meigs of the General Land Office directed Surveyor General Edward Tiffin to proceed with the survey agreeably to the Act of May 20, 1812.

15. On December 31, 1816 the Surveyor General engaged William Harris to make the required surveys.

16. During July and August 1817 William Harris surveyed and marked the lines. He ran the western boundary of Ohio, which was also the eastern boundary of Indiana, on a due north course. He then determined the latitude of the southern extreme of Lake Michigan and it was variously reported to be 41° 37′ 19″ or 41° 38′ 58″ North. By comparison with Hough's determination of the latitude of the north cape of Miami Bay, Harris concluded that the southern extreme of Lake Michigan was south of that cape.

Harris then ran a line due east from the point ascertained as the southern extremity of Lake Michigan until it intersected the due north line which he had run for the western boundary of Ohio. From this point of intersection, Harris continued the due north line twelve miles further, and set a temporary post. Commencing at this point, Harris ran a random traverse to the north cape of Miami Bay and calculated the course of a single line from the north cape to the southern extreme of Lake Michigan. He then started at the north cape of Miami Bay and ran this computed line, the bearing of which he reported to be S 87° 42′ W, to an intersection with the due north line previously run as the western boundary of Ohio. This intersection was found to be 5 miles, 24 chains, 64 links north of the intersection of the western boundary with the due east line which he had run from the southern extreme of Lake Michigan. The line thus run from the north cape of Miami Bay to the western boundary of Ohio is known as the Harris Line. Harris also found that a due east line from the southern extremity of Lake Michigan would strike Lake Erie 7 miles 49 chains south of the north cape of Miami Bay.

17. On June 24, 1818 Secretary of the Treasury William H. Crawford requested Commissioner Josiah Meigs of the General Land Office to adopt without delay the measures necessary for surveying and marking the northern boundary of the State of Ohio, in conformity with the provisions of the Act of May 20, 1812.

18. On June 29, 1818 the Commissioner of the General Land Office ordered Surveyor General Edward Tiffin to adopt measures necessary to make the survey, and to run the line to coincide with the parallel of latitude of Lake Michigan.

19. Thereupon, the Surveyor General entered into a contract with John A. Fulton and issued instructions for procedures to be followed in making the survey of the northern boundary of Ohio. He was to start at the point previously set by Harris where a due east line from the southern extreme of Lake Michigan intersected the western

boundary of Ohio. From there, he was instructed to survey and mark a line, due east, as nearly as it could be done with the compass, to the border of Lake Erie.

20. In October 1818 John A. Fulton made the survey as directed, which is known as the Fulton Line. That line reached Lake Erie at a point approximately twelve miles east of the mouth of the Miami (Maumee) River.

21. On March 7, 1820 Commissioner Meigs of the General Land Office transmitted copies of the Harris and Fulton plats to the Secretary of the Treasury.

22. On the same day the Secretary of the Treasury transmitted these plats to President Monroe for communication to Congress.

23. On March 8, 1820 President Monroe transmitted the plats to the Congress with the following message: "I transmit to Congress a report from the Secretary of the Treasury, which, with the accompanying documents, will shew that the act of the 20th May, 1812, respecting the northern and western boundaries of the State of Ohio, has been executed." Messages and Papers of the Presidents, Vol. II, page 637.

24. A reproduction of a map showing the relative positions of Lakes Erie and Michigan according to the Mitchell map of 1755 is annexed as Appendix A. This map appears in S. Doc. No. 211, 24th Cong., 1st sess., March 1, 1836.

25. On July 14, 1832 the Congress enacted "An Act to provide for the taking of certain observations preparatory to the adjustment of the northern boundary line of the state of Ohio," which provided:

> ". . . That the President of the United States cause to be ascertained, by accurate observation, the latitude and longitude of the southerly extreme of Lake Michigan; and that he cause to be ascertained, by like observation, the point on the Miami of the Lake which is due east therefrom, and also, the latitude and longitude of the most northerly cape of the Miami bay; also, that he cause to be ascertained, with

all practicable accuracy, the latitude and longitude of the most southerly point in the northern boundary line of the United States in Lake Erie; and also, the points at which a direct line drawn from the southerly extreme of Lake Michigan, to the most southerly point in said northern boundary line of the United States, will intersect the Miami river and bay; and also, that he cause to be ascertained by like observation, the point in the Mississippi which is due west from the southerly extreme of Lake Michigan; and that the said observations be made, and the result thereof returned, to the proper department within the current year." 4 Stat. 596.

26. After an interim report by Captain Andrew Talcott, who had been selected to make the observations required by the Act of July 14, 1832, the Act of March 2, 1833 extended the time for making return of the observations to December 31, 1835. 4 Stat. 619, 628-629.

27. In a report dated January 17, 1834 Captain Talcott stated the longitude of Turtle Island to be 83° 17′ 22.5″ West and of the north cape of Maumee Bay to be 83° 18′ 55.5″ West. The Maumee Bay, to which Captain Talcott referred, was the bay at the mouth of the river which had theretofore been called the Miami of the Lake but which by this time had come to be known as the Maumee.

In his report dated November 23, 1835, he stated, inter alia:

"1. The most southern extreme of lake Michigan is in latitude 41 deg. 37 min. 07 sec. N.

"The greatest difference, arising from a comparison of the observations, being 03.05 sec. and the greatest difference from the mean result, 01.17 sec.

. . .

"3. The north cape of the Maumee bay is in latitude 41 deg. 44 min. 07 sec. N.

"This result is obtained from a series of observations made on fourteen different stars, the greatest

difference, as before, being 02.56 sec. and the difference obtained, from a comparison with the mean result, being 01.50 sec.

"The observations from which the above latitude is deduced, were made on Turtle island; the difference of latitude having been determined trigonometrically.

"The latitude of the astronomical station on Turtle island, Maumee bay, is 41 deg. 45 min. 12 sec. N." House Doc. [Exec.] No. 7, 24th Cong., 1st sess. pp. 2-4, December 10, 1835.

28. On December 9, 1835 President Jackson transmitted to the Senate and the House of Representatives the reports and accompanying documents described in Finding 27.

29. On a map signed by Captain Talcott, entitled "Map exhibiting the position of the several lines connected with the settlement of the Ohio boundary question", which was transmitted to the Congress by President Jackson on January 11, 1836, the bearing of the line from the north cape of Maumee Bay to the south bend of Lake Michigan at its beginning at the north cape is given as 91° 01' 04.8" or S 88° 58' 55.2" W. A reproduction of this map is annexed as Appendix B. House Doc. [Exec.] No. 54, 24th Cong., 1st sess., January 12, 1836.

30. Turtle Island is a very small island located off the entrance to Maumee Bay. Map of Turtle Island-1885 [Mich. Exhibit No. 29].

31. In 1835 Captain Talcott located the north cape of Maumee Bay at a distance of 3,177.3 yards from the lighthouse on Turtle Island, in the direction of S 44° 52' 53.6" W. The north cape has long since been eroded at this point. A reproduction of a relevant portion of the map dated 1835 entitled "Ohio Boundary No. 2" signed by Captain Talcott, showing this area, which was also transmitted to the Congress by President Jackson on January 11, 1836, is annexed as Appendix C.

32. The approximate position of the lighthouse on Turtle Island used by Captain Talcott in making his ob-

servations can be determined today. An abandoned and ruined lighthouse is still visible on the island and it is probably no more than ten meters distant from the site of the original lighthouse. The lighthouse site in the center of the island is enclosed by a circular concrete seawall 190 feet in circumference.

33. After the submission of Captain Talcott's final report, Congress enacted the Act of June 15, 1836 "to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed", and eight days later the Act of June 23, 1836, "to settle and establish the northern boundary line of the State of Ohio."

34. The Act of June 15, 1836, in sections 1 and 2, in pertinent part, provided:

> "[SEC. 1] . . . That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said last mentioned line, to its intersection with the western line of the State of Pennsylvania.
>
> "SEC. 2 . . . That the constitution and State Government which the people of Michigan have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed; and that the said State of Michigan shall be, and is hereby, declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatsoever: *Provided always*, and this admission is upon the express condition, that the said State shall consist of and have jurisdiction over all the territory included within the following

boundaries, and over none other, to wit: Beginning at the point where the above described northern boundary of the State of Ohio intersects the eastern boundary of the State of Indiana, and running thence with the said boundary line of Ohio, as described in the first section of this act, until it intersects the boundary line between the United States and Canada, in Lake Erie; thence, with the said boundary line between the United States and Canada through the Detroit river, . . . thence, through the middle of Lake Michigan, to the northern boundary of the State of Indiana, as that line was established by the act of Congress of the nineteenth of April, eighteen hundred and sixteen; thence, due east, with the north boundary line of the said State of Indiana, to the northeast corner thereof; and thence, south, with the east boundary line of Indiana, to the place of beginning." 5 Stat. 49-50.

35. The Act of June 23, 1836 provided:

"That the northern boundary of the State of Ohio shall be established by, and extend to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay; thence, northeast, to the northern boundary line of the United States; thence, with said line, to the Pennsylvania line." 5 Stat. 56-57.

36. The conditions expressed in the Act of June 15, 1836 appeared in section 3 thereof and provided that Michigan could gain admission to the Union only upon the condition that the state, through a convention of elected delegates, assented to the boundaries set forth in section 2 of the Act, which included a southern boundary running with the northern boundary line of Ohio as set forth in the first section of the Act. On December 15, 1836 a convention of elected delegates of Michigan did assent to these boundaries and by the Act of January 26, 1837, the Congress admitted the State of Michigan into the Union. 5 Stat. 144.

37. At the time the Acts of June 15, 1836 and June 23, 1836 were enacted the noun "northeast" was defined by Webster's American Dictionary of the English Language as "The point between the north and east, at an equal distance from each."

38. A map in the official files of the United States Lake Survey, Corps of Engineers, United States Army, embodying the results of a survey made in 1844 of Maumee Bay under the direction of Captain W. G. Williams, of the United States Topographical Engineers, shows the boundary line between Ohio and Michigan as beginning a course of North 45° East at the point described on the map as "NORTH CAPE". The boundary line shown on the map following that course from North Cape bisects Turtle Island, and is shown as either passing through the lighthouse on this island or very near to it. A reproduction of a portion of this map is annexed as Appendix D.

39. In 1961 a geodetic determination by the United States Lake Survey of the position of the Turtle Island lighthouse showed it to be in latitude 41° 45' 08.740" North and longitude 83° 23' 28.213" West.

40. In 1915 the legislatures of the States of Michigan and Ohio each appropriated funds for the relocation, establishment and imperishable monumenting of their common boundary and commissioners were appointed by each state to carry out the joint project. S. S. Gannett of the United States Geological Survey was employed by the commissioners as engineer in charge of the work, which was completed in November 1915. It was essentially a retracement of the Harris survey. It was, however, not run as a perfectly straight line, but frequently followed existing monuments, fences, highways and other landmarks, when they were agreed to by adjacent landowners as being on the state line. The line was monumented from its beginning at the northwest corner of Ohio to Post 71 near the western shore of Maumee Bay. No monument was set at the north cape of the bay since the cape as it existed in 1836 had been washed away for many years. The land boundary as

thus established and monumented has been accepted by both states.

41. From the report of Engineer Gannett to the joint commissioners, dated November 30, 1915, it appears that the easternmost monument set on the boundary line, Post 71, was set in swampy ground about 900 feet west of the shore of Maumee Bay. That monument was set in latitude 41° 43′ 56.63″ N and longitude 83° 27′ 16.97″ W. The next monument to the west is Post 70 which was set in latitude 41° 43′ 55.78″ N and longitude 83° 27′ 47.17″ W. From Post 70 to Post 71 the true bearing is N 87° 49′ 44″ E and the distance 2,291.2 feet. The next monument to the west of Post 70 is Post 69 which was set in latitude 41° 43′ 54.63″ N and longitude 83° 28′ 27.59″ W. From Post 69 to Post 70 the true bearing is N 87° 49′ 34″ E and the distance 3,066.8 feet. Report of Commissioners on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary, July 1, 1916, pages 81-82.

The foregoing geodetic positions of Posts 71, 70 and 69 were, obviously, not determined with reference to the presently current North American datum of 1927. If such a determination of the positions of these fixed monuments should be needed in connection with the determination with reference to the North American datum of 1927 of the geodetic position of the north cape of Maumee Bay as it was in 1836, it can readily be made by the appropriate agency of the United States government.

42. A joint resolution of the legislature of Ohio "Relative to the boundary line between the two states of Ohio and Michigan in Lake Erie," approved June 8, 1933, provided:

> "Whereas, Uncertainty has existed concerning the boundary between the states of Ohio and Michigan in Lake Erie, due to the omission of this portion of the boundary on some maps and its incorrect position on others, and
>
> "Whereas, The easterly terminal monument of the Ohio-Michigan land-boundary line set in 1817

by Andrew Harris has disappeared, due to the washing away of North Cape at the place where the monument originally stood, and

"Whereas, The earliest United States lake survey charts of the region show that the aforesaid terminal monument was at or near the intersection of the land-line between the two states and a line drawn south forty-five degrees west (S 45° W) through the center of Turtle island which is located at latitude 41° 45' 08.8" and longitude 83° 23' 28.8" according to primary triangulation of the United States lake survey published in 1882, and

"Whereas, The center part of the island was preserved by a circular concrete sea wall about 190 feet in diameter by the U.S. lighthouse service, which wall is still standing; therefore,

"*Be it resolved by the General Assembly of the State of Ohio,* That with the concurrence of the legislature of Michigan, the boundary line between the two states in Lake Erie shall be a line passing through the center of the aforesaid circular wall and bearing south forty-five degrees west (S 45° W) therefrom until it shall intersect the land-line between the two states as marked and monumented by them in 1915; and that from the aforesaid center of the circular wall the boundary in Lake Erie shall extend north forty-five degrees east (N 45° E) until it shall intersect the international boundary between the United States and Canada, it being understood that all bearings herein referred to shall be measured from a true meridian through the center of the aforesaid circular wall on Turtle island." 115 Laws of Ohio 685 (1933).

43. Senate Concurrent Resolution No. 15 "Relative to the boundary line between the two states of Ohio and Michigan in Lake Erie," adopted by the Senate of Michigan on March 6, 1945 (Senate Journal, 1945, p. 432) and by the House of Representatives of that state on March 22, 1945 (House Journal, 1945, p. 807), provided:

"Whereas, Uncertainty has existed concerning the boundary between the states of Ohio and Michigan in Lake Erie, due to the omission of this portion of the boundary on some maps and its incorrect position on others; and

"Whereas, The easterly terminal monument of the Ohio-Michigan land-boundary line set in 1817 by Andrew Harris has disappeared, due to the washing away of North Cape at the place where the monument originally stood; and

"Whereas, The earliest United States lake survey charts of the region show that the aforesaid terminal monument was at or near the intersection of the land-line between the two states and a line drawn south forty-five degrees west (S 45° W) through the center of Turtle island which is located at latitude 41° 45′ 08.8″ and longitude 83° 23′ 28.8″ according to primary triangulation of the United States lake survey published in 1882; and

"Whereas, the center part of the island was preserved by a circular concrete sea wall about 190 feet in diameter by the U.S. lighthouse service, which wall is still standing; now therefore be it

"Resolved by the Senate (the House of Representatives concurring), That the boundary line between the states of Ohio and Michigan in Lake Erie shall be a line passing through the center of the aforesaid circular wall and bearing south forty-five degrees west (S 45° W) therefrom until it shall intersect the land-line between the two states as marked and monumented by them in 1915; and that from the aforesaid center of the circular wall the boundary in Lake Erie shall extend north forty-five degrees east (N 45° E) until it shall intersect the international boundary between the United States and Canada, it being understood that all bearings herein referred to shall be measured from a true meridian through the center of the aforesaid circular wall on Turtle island." Michigan Senate Journal, 1945, page 291.

44. House Concurrent Resolution No. 38 adopted by the House of Representatives of Michigan on May 13, 1947 (House Journal, 1947, p. 1170) and by the Senate of that state on May 20, 1947 (Senate Journal, 1947, p. 1124), provided:

"Whereas, In the 1945 regular session of the legislature of Michigan adopted Senate Concurrent Resolution No. 15 relative to the boundary line between the two states of Ohio and Michigan in Lake Erie; and

"Whereas, Said concurrent resolution was presented to the legislature as a part of a proposal to determine the area of the entire state by inclusion of water areas within the total and without any other significance; and

"Whereas, Upon subsequent investigation it became apparent that an area of about 70 square miles in Lake Erie was involved in the matter then presented and some question as to the jurisdiction over said water existed between the state of Ohio and the state of Michigan; and

"Whereas, The particular area in question became a matter of dispute because of early surveys and maps purporting to determine the boundary line between the states in Lake Erie and showing for a great many years that the said boundary ran from a terminus in Lake Erie from a nonexistent boundary marker, which was formerly Grassy Point, to a turning point in the international boundary line between the United States and Canada, said line being at an angle more acute than 45 degrees; and

"Whereas, The state of Ohio, by a concurrent resolution adopted several years ago attempted to resolve the stated uncertainty concerning the boundary line by adopting a point on Turtle Island in Lake Erie as a basis for a line at 45° to intersect the land boundary line between the states and to intersect the International boundary line thereby conforming more

closely to the language of the original and enabling acts and the constitutional provisions regarding the boundary line between the two states; and

"Whereas, It is apparent that for many years the state of Michigan has exercised jurisdiction over the area in question and may have established by adverse possession and by consent and acquiescence of the state of Ohio a good title thereto; and

"Whereas, Since the action of the two legislatures by concurrent resolution is not sufficient in the law governing the relationship of States to convey title or change boundary lines, no settlement of any such dispute can be reached by such method; and

"Whereas, If a settlement is to be reached it will, of necessity, require statutory enactment by the two states and should be the subject matter of an investigation by a joint boundary commission; now therefore be it

"Resolved by the House of Representatives (the Senate concurring), That the State of Michigan nor any rights of said state concerning the boundary line in Lake Erie between the state of Ohio and the state of Michigan were not affected by the adoption of Senate Concurrent Resolution No. 15 of the 1945 session of the Michigan legislature; and be it further

"Resolved, That insofar as said concurrent resolution No. 15 may in any manner be interpreted as determinative of the position of the state of Michigan with regard to the said boundary in Lake Erie, said concurrent resolution is hereby rescinded; and be it further

"Resolved, That the Governor of the state of Michigan is hereby requested to confer with the Governor of the state of Ohio concerning the subject matter hereof with a view to requesting the legislatures to establish a boundary commission to investigate and to report to the legislatures the rights of the respective states within Lake Erie; and be it further

"Resolved, That a copy of thicurrent resolution be sent to the Governor of tate." Michigan House Journal, 1947, pages 957-95

45. There was no evidence presethat any action was taken by the two states to establi joint boundary commission as suggested in House Crent Resolution No. 38 adopted by the legislature of Man in 1947.

46. Annexed hereto as Appendix a reproduction of the map of the Erie Quadrangle e topographical map of the United States published le United States Geological Survey in 1952, with the aboration of the State Highway Commissioner of Mic n, which shows the boundary between Ohio and Mic n as running in an apparently due northeast directiough the center of Turtle Island.

47. The location of the north c of Maumee Bay which Harris in 1817 determined to e easterly terminus of the Ohio-Michigan land boun as it existed in 1836, as closely as it can be now asc ed, is the point now in the bed of Maumee Bay wher ne drawn South 45° West through the center of the ng circular concrete sea wall on Turtle Island int ts a line drawn North 87° 49′ 44″ East from Post the easternmost existing monument on the Ohio-Mic n land boundary line, both bearings being measured fr true meridian.

DISCUSSION

Introductory Statement

The foregoing findings of fact include findings with respect to all the facts which I regard as relevant as well as findings with respect to facts which, while not strictly relevant, may serve to illumine the background of the controversy. I have not included findings with respect to certain other facts requested by the parties because either they did not seem to me to be established by the evidence or were not relevant to the narrow issue involved in the case.

That issue, as I understand it, is as to the meaning and effect to be given to the language of the Act of June 15, 1836, 5 Stat. 49, which defined the northern boundary of the State of Ohio and directed that it shcuild be the boundary between the States of Ohio and Michigan. The language of the Act of June 23, 1836, 5 Stat. 56, which also defined that boundary, is in substance the same as that of the earlier Act and need not be separately considered for that reason and also because the boundary as defined by the Act of June 15, 1836 was the one which was specifically accepted by the State of Michigan as a condition precedent to its admission to the Union, as required by that Act, and which is, therefore, binding on that state.

The Act of June 15, 1836 defined the boundary in dispute as "a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; . . ." [Finding 34].

Background—The Ohio-Michigan Land Boundary

A brief account of the origin of the controversy which the Acts of 1836 sought to settle may be helpful. When the

Ordinance of 1787 was adopted organizing the Northwest Territory no accurate surveys of the western country had been made and it was believed that the southern extremity of Lake Michigan lay considerably north of what was afterward ascertained to be its true location. Mitchell's map, published in 1755, which was before the Congress in 1787, 1802 and 1805, shows a due east line from the southern bend of Lake Michigan intersecting the Detroit River somewhat north of its mouth in Lake Erie. [Appendix A]. Thus, when the Congress by the Act of April 30, 1802 authorized the inhabitants of that part of the Northwest Territory which was destined by the Ordinance of 1787 to become the "eastern State", to form a constitution and state government, the northern boundary of the new state was described as "an east and west line, drawn through the southerly extreme of Lake Michigan, running east after intersecting the due north line aforesaid, from the mouth of the Great Miami [the western boundary of the new state], until it shall intersect Lake Erie, or the territorial line, and thence with the same through Lake Erie to the Pennsylvania line." [Finding 7]. And in 1805 when the Congress created Michigan Territory out of the northern portion of Indiana Territory it included all of the latter territory which lay north "of a line drawn east from the southerly bend or extreme of Lake Michigan, until it shall intersect Lake Erie" [Finding 10].

However, doubt as to the accuracy of the then understood location of the southern extremity of Lake Michigan had arisen as early as 1802. This doubt actuated the constitutional convention of Ohio in that year to include in the new state constitution a proviso that if the southern extremity of Lake Michigan should be found to extend so far south that a line drawn due east from it would not intersect Lake Erie or would intersect that lake east of the mouth of the Miami [Maumee] River, then with the assent of the Congress, "the northern boundary of this State shall be established by, and extending to, a direct line, running from the southern extremity of Lake Michigan to the most

northerly cape of the Miami [Maumee] Bay, after intersecting the due-north line from the mouth of the Great Miami River as aforesaid [the western boundary of the state]; thence northeast to the territorial line, and by the said territorial line, to the Pennsylvania line." [Finding 8].

The fact is, as was determined by a survey made by Fulton in 1818, that a line drawn due east from the southern extremity of Lake Michigan would intersect the south shore of Lake Erie about twelve miles east of the mouth of the Maumee River. This line became known as the Fulton Line [Finding 20; Appendix B]. A survey by Harris in 1817 had established the line called for by the proviso of the Ohio Constitution of 1802 from the southern extremity of Lake Michigan to the most northerly cape of Maumee Bay. At the eastern border of Indiana the Harris Line was found to be a little more than five miles north of the Fulton Line and at its eastern end at the north cape of Maumee Bay the Harris Line was found to be more than seven miles north of the Fulton Line [Finding 16]. The long narrow segment of land lying between the two lines, which included Maumee Bay, the mouth of the Maumee River and the port city of Toledo [Appendix B], became the subject of dispute between the State of Ohio and the Territory of Michigan, a dispute which was ultimately settled in favor of Ohio by the Congress, with the consent of Michigan, by the passage of the Act of June 15, 1836.

The Ohio-Michigan Boundary in Lake Erie

The Act of June 15, 1836 in addition to defining and settling the land boundary between Ohio and Michigan from the Indiana line to the north cape of Maumee Bay also determined the boundary between the two states through the waters of Lake Erie easterly of the north cape of Maumee Bay. This it did by the language "and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie." [Finding 34]. The land

portion of the line was early established and accepted, having been defined as a direct line between two observable physical features which served as monuments, namely, the southern extremity of Lake Michigan and the most northerly cape of Maumee Bay. But since the Lake Erie portion of the line was defined in the statute merely by its bearing, "northeast," from a single monument, the most northerly cape of Maumee Bay, to an undefined point in another line, the international boundary line in Lake Erie, its exact location was never settled between the states. The question apparently remained dormant until about 1933 when the State of Ohio enacted the joint resolution of June 8, 1933, to which I shall later refer, which expressly described this portion of the boundary as having a bearing of North 45° East [Finding 42]. Michigan now seeks by the present suit a determination of the precise bearing of the line which is called for by the statutory word "northeast."

It is the contention of Michigan that the statute does not call for an angle in the boundary line at the north cape and that "northeast" as there used means in the same northeasterly direction as the land line, that is, a continuation or extension of the land line on a course having the same bearing as that line. Ohio, on the other hand, contends that the statutory language indicates that the boundary takes a new course at the north cape and that the bearing of that course, defined as "northeast", must, in the absence of qualifying language, be taken to be due northeast, that is, North 45° East.

It is true, of course, that the bearing of the land portion of the boundary, at its easternmost monument, Post 71, is slightly northeasterly, being in fact North 87° 49′ 44″ East, which is 2° 10′ 16″ north of east. [Finding 41]. Accordingly, if the statute had defined the line as running from the north cape of Maumee Bay in a northeasterly direction on a continuation of the same course as the land line to the international boundary line there would be force in Michigan's contention. But there is no such qualifying language in the Act of 1836.

Michigan also argues that certain correspondence and committee reports in the period of controversy before the passage of the Act of 1836 support its contention that a continuation of the water boundary on the same course as the land line was contemplated. But if the words of a statute are clear and free from ambiguity we may not look to legislative history to create an ambiguity where none exists. United States v. Missouri Pacific Railroad Company, 1929, 278 U.S. 269, 277-278; Wilbur v. United States, 1931, 284 U.S. 231, 237; United States v. Shreveport Grain & Elevator Company, 1932, 287 U.S. 77, 83; Helvering v. City Bank Farmers Trust Co., 1935, 296 U.S. 85, 89; United States v. Public Utilities Commission, 1953, 345 U.S. 295, 315. Here the language of the statute seems to me to be perfectly clear and unambiguous and to contemplate an angle in the boundary line and the beginning of a new course at the north cape of Maumee Bay. To me the words "and from the said north cape of the said bay, northeast" can have no other rational meaning.

This leaves only the question as to what is the bearing of the new course starting at the north cape. The statutory answer is that it is to be "northeast". In the absence of any qualifying words, and there are none, this can only mean due northeast, that is, toward a point between north and east which is equally distant from each. This is the definition given in Webster's American Dictionary of the English language which was current in 1836. [Finding 37]. In surveying terms it means North 45° East. This is the only meaning which will give that precision to the statutory language which it must have if it is to effectuate the Congressional purpose in enacting it. That the word "northeast" as used in the statute was contemporaneously understood to have this meaning is indicated by the fact that Captain Williams, the Government engineer who surveyed the area in 1844, indicated on his map of the area a boundary line between Ohio and Michigan running North 45° East from the north cape of Maumee Bay. [Finding 38; Appendix D]. It is also suggested by the fact that

later maps have likewise indicated the boundary in the lake as running North 45° East. Thus, the map of the Erie Quadrangle of the topographical map of the United States published by the United States Geological Survey in 1952 with the collaboration of the State Highway Commissioner of Michigan [Finding 46; Appendix E], shows the boundary between the States of Ohio and Michigan as following a true northeast course in Lake Erie.

Michigan argues that the statutory term "northeast" should be construed to mean in a northeasterly direction, that is, the bearing of a line running to a point somewhere between north and east. But such a bearing would be so indefinite as to be impossible to follow unless a terminal monument at its northeasterly end was also specified in the statute. In answer to this point Michigan asserts that such a terminal monument was so specified and it points in this connection to the statutory language which states that the line shall be drawn from the north cape of Maumee Bay northeast "to the boundary line between the United States and the province of Upper Canada, in Lake Erie." This argument I cannot accept. A monument in order to serve as the terminal point of a boundary line must itself be located at a single fixed point. Obviously a line, which necessarily passes through an indefinite number of points, may not fulfill this office, even though ever so clearly defined and located.

The practical result of giving the statutory word "northeast" its normal meaning seems to me to speak in favor of following that course. For a due northeast boundary line will very roughly bisect the angle formed in the western end of Lake Erie by the coasts of Michigan and Ohio, respectively, and will allot to each state portions of Lake Erie opposite its coastline. The line claimed by Michigan, on the other hand, would allot to that state a long triangular segment of Lake Erie opposite the Ohio shore and far removed from the Michigan shore which would throw West Sister Island into Michigan and would extend eastwardly to an apex less than one and one-half miles

north of Ohio's North Bass Island. [Mich. Exhibit No. 41] It is impossible for me to believe that the Congress in 1836 intended such a bizarre result as this.

I conclude that the Act of June 15, 1836 calls for a boundary line drawn from the north cape of Maumee Bay, as it existed in 1836, through Lake Erie to the international boundary line on a course having a bearing North 45° East.

The Recovery of the 1836 Location of the North Cape of Maumee Bay

The north cape of Maumee Bay to which the Act of June 15, 1836 referred was, obviously, the cape as it existed at that time. Admittedly, it has eroded a considerable distance to the north since 1836. The problem remains, therefore, to establish the point in the bed of Maumee Bay which was the location of the north cape in that year. We are greatly helped in solving this problem by the presence in Lake Erie off the mouth of Maumee Bay of a small island known as Turtle Island on which a lighthouse was formerly maintained by the government. [Findings 30 and 32].

Captain Talcott in 1835 located the north cape of Maumee Bay at a distance of 3,177.3 yards from the lighthouse on Turtle Island in the direction South 44° 52′ 53.6″ West. [Finding 31; Appendix C]. A little later, in 1844, Captain Williams made a survey which showed that a line drawn North 45° East from the north cape of Maumee Bay would pass through or very near to the lighthouse on Turtle Island [Finding 38; Appendix D]. That lighthouse has long since been abandoned but its probable location can still be determined. In addition, there is a circular concrete seawall about 190 feet in diameter which was built by the United States Lighthouse Service and which enclosed the lighthouse area in the center of the island. [Finding 32].

The Ohio-Michigan land boundary was monumented in 1915 under the auspices of a joint commission, retracing as nearly as possible the Harris survey. [Finding 40]. The land boundary thus monumented as it approaches Post 71, the easternmost monument on the land line, follows a course having the bearing North 87° 49′ 44″ East. [Finding 41]. That same line extended eastwardly from Post 71 across Maumee Bay should pass through the 1836 location of the north cape of Maumee Bay, since that was the original eastern terminus of the land boundary line. A line drawn South 45° West from the presumed location of the former lighthouse in the center of the circular concrete seawall on Turtle Island should also pass through the 1836 location of the north cape of Maumee Bay. Accordingly, the location of the north cape may be recovered today by determining the point of intersection of those two lines.

It is true that the land boundary, as monumented in 1915, may vary slightly from the original Harris line. Likewise, Talcott and Williams vary by 7′ 6.4″ in their determinations of the bearing of a line drawn from the former lighthouse on Turtle Island to the north cape of Maumee Bay as it then existed. But these variations, the latter of which may well be the result of minor erosion taking place between 1835 and 1844, are, in my judgment, so small as to be inconsequential in view of the impossibility of determining today the precise points on the north cape which were used by Harris, Talcott and Williams, respectively, in making their surveys. Indeed, the distance between the points on the north cape sighted by Talcott and Williams, respectively, I compute at less than 22 feet. I believe it to be of much more significance, from a practical standpoint, that a line drawn from the north cape of Maumee Bay, as it was located by Captain Williams in 1844, on a course having a bearing of North 45° East would pass through the site of the old lighthouse in approximately the center of the seawall on Turtle Island, thus establishing the center of the existing seawall on that

island as a permanent monument on the boundary line between the two states in Lake Erie.

This fortunate circumstance will very greatly facilitate not only the demarcation, but also the continuous recognition of the location, of that boundary. I am the more persuaded of its appropriateness by the fact that the legislatures of Ohio and Michigan, in resolutions passed in 1933 and 1945, respectively, declared their boundary in Lake Erie to be a line passing through the center of the circular concrete seawall on the center part of Turtle Island and bearing South 45° West therefrom until it should intersect the land line between the two states as marked and monumented by them in 1915 [i.e., the former location of the north cape of Maumee Bay]; and that from the aforesaid center of the circular wall the boundary in Lake Erie should extend North 45° East until it intersected the international boundary line between the United States and Canada. [Findings 42 and 43]. It is true that the resolution by Michigan to this effect in 1945 was a concurrent resolution which, as such, did not have the force of law and that it was rescinded by the Michigan legislature in 1947. [Finding 44]. However, although admittedly not binding on Michigan as a settlement of the present controversy, these resolutions indicate the understanding of both states that if the boundary between them in Lake Erie should be determined to run due northeast, that is, North 45° East, from the former location of the north cape of Maumee Bay, it would pass through the center of Turtle Island. The map of the Erie Quadrangle of the topographical map of the United States published by the United States Geological Survey, with collaboration by the State Highway Commissioner of Michigan [Appendix E], to which I have already referred, affords further evidence of such recognition. For it shows the boundary line between the two states in Lake Erie as passing through the center of Turtle Island.

CONCLUSIONS

I accordingly conclude:

1. In accord with Finding 47, that the north cape of Maumee Bay was located in 1836 at the point in that bay where a line drawn North 87° 49′ 44″ East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian.

2. That the boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836, as described in Finding 47, on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada.

3. The State of Michigan should bear the costs of this suit, including the expenses of the special master.

RECOMMENDED DECREE

In accord with my findings and conclusions, I recommend the entry of a decree in the following form:

It is now Ordered, Adjudged, and Decreed as follows:

1. The boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836 on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada.

2. In 1836 the north cape of Maumee Bay was located at the point in that bay where a line drawn North 87° 49′ 44″ East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian.

3. The costs of this suit, including the expenses of the special master, shall be borne by the State of Michigan.

The foregoing report is respectfully submitted.

Philadelphia, Pa.
June 30, 1971

ALBERT B. MARIS,
Special Master

FOLLOWING FOLDOUTS/EXHIBITS ARE TOO LARGE TO FILM

FILE COPY

DEC 23 197

E. ROBERT SEAVER, C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

—VS—

STATE OF OHIO,

Defendant.

EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

FRANK J. KELLEY
Attorney General

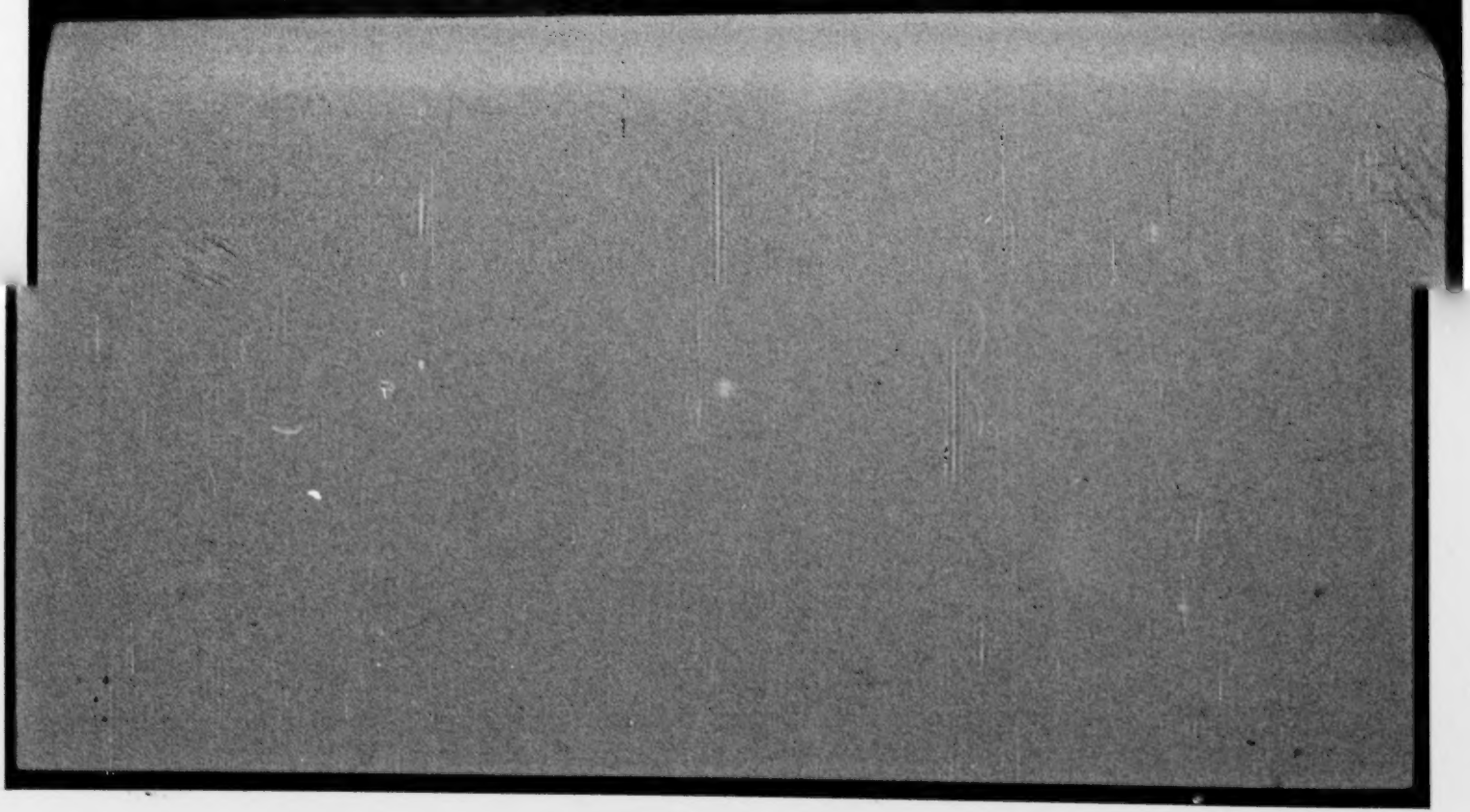
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

-vs-

STATE OF OHIO,

Defendant.

EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

TO THE HONORABLE
THE SUPREME COURT OF THE UNITED STATES

The State of Michigan, Plaintiff, by Frank J. Kelley, its Attorney General, excepts to the Report of Albert B. Maris, *Special Master,* dated June 30, 1971, and the Recommended Decree therein included, filed in the above entitled action, in the particular respects and as to the specific points as follows:

I

That the Special Master erred in failing to recommend a definition of the boundary line between Point 71, a granite post which is the easterly terminus monumenting the land boundary between Michigan and Ohio, the easterly terminus of the land monumentation of the Michigan-Ohio boundary, and the proper relocation of the north cape of the Maumee

Bay as it existed in 1836. This point was pleaded and proved by the State of Michigan. In its brief and argument in support of the findings by the State of Michigan, the State of Michigan requested a boundary line to be adopted in its conclusion and relief desired. The Special Master erred by failing to grant paragraph numbered forty-four, Michigan Finding of Fact:

> "44. From the Post 71 to the original 1835 position of the north cape of Maumee Bay, there is an undefined gap which can be located by the use of accurate instruments. This arc may be different from the arc which extends from the south bend of Lake Michigan to the north cape of Maumee Bay and on to the international boundary line. Parts I, II and Appendix of Report on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary, 1915, (Mich. Exh. 30), Tr 63—71."

II

The Special Master erred in Recommended Decree, paragraph 2:

> "2. In 1836 the north cape of Maumee Bay was located at the point in that bay where a line drawn north 87° 49′ 44″ East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian."

and by failing to grant Michigan's requested Findings of Fact Nos. 40, 41, 43 and 44:

"40. In 1961, a geodetic determination by the United States Lake Survey for the position of Turtle Island lighthouse was:

Latitude (North): 41° 45′ 08″.740

Longitude (West): 83° 23′ 28″.213

From this position applying the data of Captain Andrew Talcott, the north cape of Maumee Bay can be computed. The computation results in the north cape of Maumee Bay being defined as:

Latitude (North): 41° 44′ 02″.004

Longitude (West): 88° 24′ 56″.923

These locations are listed in the transcript, Tr 55.

"41. Pursuant to the statutory direction, Captain Andrew Talcott used accurate instruments, made multiple observations on numerous stars and made a careful mathematical analysis of the results. He then concluded that the latitudes of the several points that he was required to find would be true to the nearest second. Talcott's Report on January 17, 1834, (Mich. Exh. 24); Talcott's Report November 23, 1835, Rept. No. 380, p. 75, 24th Cong., (Mich. Exh. 8), Tr 44, 49.

"43. In 1915, the legislatures of both Michigan and Ohio appropriated funds for the survey of the common land boundary and formed a joint commission. With the uncertainty caused by the disappearance of all original monuments, there was uneasiness among the citizens, especially in the vicinity of Toledo, where land was rapidly assuming a much higher value. Because of the disappearance of the monuments and the inade-

quacy of funds, it was agreed that the line would not necessarily be straight from end to end, although the surveyors would try to relocate the original staked line; existing monuments, fences, highways or other marks agreed to by land owners on both sides as being the state line would constitute monuments for the state line and these monuments would be acceptable to the Commission to constitute the state line. There is no direct evidence of recovery of any point staked out by the Harris survey. The eastern terminus of the north cape was declared as washed away and the western terminus was established through the ancestry of an old rotted stake near some pilings. No effort was made to see, if the line were extended, whether it would be a tangent to the southern extreme of Lake Michigan. Because of the desire to have this a practical line and agreeable to the citizens of both states, it is subject to error with regard to the Acts of Congress of 1836. The commission established that the boundary line with the eastern terminus located at Post 71 on the west shore of Maumee Bay is approximately two miles from the original position of the north cape which was called for by the Harris line. It would not appear at all certain that the continuation of the line from Post 70 to Post 71 would necessarily strike the north cape of Maumee Bay as determined by Captain Andrew Talcott and as computed today. Tr 64, 65 et seq.

"44. From the Post 71 to the original 1835 position of the north cape of Maumee Bay, there is an undefined gap which can be located by the use of accurate instruments. This arc may be different from the arc which extends from the south bend of Lake Michigan to the north cape of Maumee Bay and on to the international boundary line. Parts I, II and Appendix of Report on Retracement and Permanent Monumenting of the

Michigan-Ohio Boundary, 1915, (Mich. Exh. 30), Tr 63—71."

Finding of Fact requested by Michigan is stated in full under paragraph I.

III

The Special Master erred in his Finding No. 41. There is absolutely no evidence that a line drawn at Post 71 with a true bearing of S 87° 49′ 44″ W would ever strike the southerly extreme of Lake Michigan at present, in 1916 or in 1817:

> "41. From the report of Engineer Gannett to the joint commissioners, dated November 30, 1915, it appears that the easternmost monument set on the boundary line, Post 71, was set in swampy ground about 900 feet west of the shore of Maumee Bay. That monument was set in latitude 41° 43′ 56.63″ N and longitude 83° 27′ 16.97″ W. The next monument to the west is Post 70 which was set in latitude 41° 43′ 55.78″ N and longitude 83° 27′ 47.17″ W. From Post 70 to Post 71 the true bearing is N 87° 49′ 44″ E and the distance 2,291.2 feet. The next monument to the west of Post 70 is Post 69 which was set in latitude 41° 43′ 54.63″ N and longitude 83° 28′ 27.59″ W. From Post 69 to Post 70 the true bearing is N 87° 49′ 34″ E and the distance 3,066.8 feet. Report of Commissioners on Retracement and Permanent Monumenting of the Michigan-Ohio Boundary, July 1, 1916, pages 81-82.

The foregoing geodetic positions of Posts 71, 70 and 69 were, obviously, not determined with reference to the presently current North American datum of 1927.

If such a determination of the positions of these fixed monuments should be needed in connection with the determination with reference to the North American datum of 1927 of the geodetic position of the north cape of Maumee Bay as it was in 1836, it can readily be made by the appropriate agency of the United States government."

From the Special Master's Finding No. 41, the Special Master must have found Finding No. 47, on which paragraph two of the Recommended Decree is based:

"47. The location of the north cape of Maumee Bay which Harris in 1817 determined to be the easterly terminus of the Ohio-Michigan land boundary as it existed in 1836, as closely as it can be now ascertained, is the point now in the bed of Maumee Bay where a line drawn South 45° West through the center of the existing circular concrete sea wall on Turtle Island intersects a line drawn North 87° 49′ 44″ East from Post 71, the easternmost existing monument on the Ohio-Michigan land boundary line, both bearings being measured from a true meridian."

Further, the Special Master erred in failing to grant Michigan's Finding Nos. 53, 54, 55 and pertinent portions of 56:

"53. In view of the lack of original monuments, it was agreed by the joint group that:

'(1) As nearly as may be line to be relocated as originally staked out on the ground, and not necessarily run as a straight line from end to end.

'(2) Existing monuments, fences, highways or other marks, when agreed to by land owners on both

sides as being on the State line, are to be so accepted. (p. 61)'

"The line was, in fact, run between points established in accordance with these stated principles. Tr 65

"• • •

"54. This survey was official . . . and the following points should be noted with regard to its influence on the present proceedings:

1. It seems to have been based on the assumption that the Harris line truly represented the line intended to be defined by Congress in the act providing for the admission of Michigan into the Union.

2. There is no direct evidence of recovery of any point of the Harris survey. The report states (p. 55) that 'The eastern terminus of the line, originally the most northerly cape of Maumee Bay, has been washed away for many years and did not furnish a definite starting point; neither were there other permanent or semi-permanent marks near the eastern terminus . . .' Tr 66"

"55. There is serious doubt that the 1915 survey was, in any accurate sense, an actual retracement of the Harris line.

(a) 'There is no direct evidence of recovery of any point of the Harris survey. The report states (page 55) that "The eastern terminus of the line, originally the most northerly cape of Maumee Bay, has been washed away for many years and did not furnish a definite starting point; neither were there

other permanent or semi-permanent marks near the eastern terminus . . .' . . .

(b) There is no reference in the 1915 report to any effort made to ascertain if the line actually run tended, if extended westwardly, to terminate in a tangent to the southern extreme of Lake Michigan.

"56. . . . On Map No. 9 of the 1915 report a dotted line extends eastwardly from the plotted position of Post 71, with the note 'Toward original position of northernmost cape of Maumee Bay.' Since the original position of the northernmost cape was neither physically recovered nor dimensionally referenced by the 1915 survey, this note is subject to error . . ."

IV

The Special Master erred by including in paragraph I of the Recommended Decree the monument Turtle Island. Neither the Michigan Enabling Act, Act of June 15, 1836, c. 99, 5 Stat. 49, nor the Act to settle and establish the northern boundary line of Ohio, Act of June 23, 1836, c. 117, 5 Stat. 56, contained any reference to Turtle Island.

V

The Special Master erred in not finding the pertinent portion of Michigan's Request for Finding of Fact No. 34. Such pertinent portions are quoted as follows:

"34. In the 20th Congress, the House Committee on Territories . . ., under date of March 18, 1828, stated:

'From the time the State of Ohio was admitted into the Union, . . . it seems to have been supposed that the existing maps of that part of the country might be . . . erroneous . . .'

'Your committee recommended to the House, that . . . before any definitive legislation be had upon the subject, namely: The latitude of the southerly extreme of Lake Michigan, and where the same parallel of latitude crosses the Miami . . . River; and also, where it intersects the shore of Lake Erie; the latitude of the south point of North Cape, in Miami [Maumee] bay and the latitude 42° 30′ N., where it intersects the western shore of Lake Michigan. . . .

'It is also proposed that the intermediate lines between certain points shall be traced and marked. . . . these lines shall be run without the aid of the compass; . . .

'And as science and skill alone will not do, without the aid of the best instruments, it is proposed to authorize the President of the United States to employ two or more of the Topographical Engineers to perform the work.'

". . . the Ohio legislature presented a memorial. . . . The date of the memorial is March 12, 1831. . . . Among other things, the memorial deals directly with the bearing across Lake Erie to its intersection with the northern boundary line of the United States. . . ."

'. . . This act is respectfully submitted to the consideration of Congress, and with it, the suggestion, that the Territorial line is still the northern

boundary of Ohio, in terms, after intersecting it—not by a due east and west line, (for that is impossible) but—by an *easterly and westerly line, drawn through the southerly extreme of Lake Michigan, intersecting the Territorial line at its most southerly approximation in Lake Erie.'*

'The understanding and intention of the people of Ohio have been uniform on this subject. . . . the northern boundary shall be established as far north as the most northerly Cape of Miami Bay.'

VI

The Special Master erred in the Recommended Decree, paragraph one:

"1. The boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836 on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada."

VII

The Special Master erred in his declaration beginning on page 27:

"The Act of June 15, 1836 in addition to defining and settling the land boundary between Ohio and

Michigan from the Indiana line to the north cape of Maumee Bay also determined the boundary between the two states through the waters of Lake Erie easterly of the north cape of Maumee Bay. This it did by the language 'and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie.' [Finding 34]. The land portion of the line was early established and accepted, having been defined as a direct line between two observable physical features which served as monuments, namely, the southern extremity of Lake Michigan and the most northerly cape of Maumee Bay. But since the Lake Erie portion of the line was defined in the statute merely by its bearing, 'northeast,' from a single monument, the most northerly cape of Maumee Bay, to an undefined point in another line, the international boundary line in Lake Erie, its exact location was never settled between the states. The question apparently remained dormant until about 1933 when the State of Ohio enacted the joint resolution of June 8, 1933, to which I shall later refer, which expressly described this portion of the boundary as having a bearing of North 45° East [Finding 42]. Michigan now seeks by the present suit a determination of the precise bearing of the line which is called for by the statutory word 'northeast.' "

Further, the Special Master erred in his Finding No. 46, and his discussion about said finding on page 29, et seq, of the report of the Special Master:

"... It is also suggested by the fact that later maps have likewise indicated the boundary is the lake as running North 45° East. Thus, the map of the Erie Quadrangle of the topographical map of the United States published by United States Geological Survey

in 1952 with the collaboration of the State Highway Commission of Michigan [Finding No. 46; Appendix E], shows the boundary between the States of Ohio and Michigan as following a true northeast course in Lake Erie."

VIII

The Special Master erred in his Finding No. 38, page 18, Special Master's Report. This finding states:

"38. A map in the official files of the United States Lake Survey, Corps of Engineers, United States Army, embodying the results of a survey made in 1844 of Maumee Bay under the direction of Captain W. G. Williams, of the United States Topographical Engineers, shows the boundary line between Ohio and Michigan as beginning a course of North 45° East at the point described on the map as "NORTH CAPE". The boundary line shown on the map following that course from North Cape bisects Turtle Island, and is shown as either passing through the lighthouse on this island or very near to it. A reproduction of a portion of this map is annexed as Appendix D."

In addition, the Special Master erred in failing to find the requested Findings of Fact of the State of Michigan, Nos. 45, 47, 48 and 49:

"45. The Ohio Governor's representative designated to inspect the topographic survey made by the United States Geological Survey in cooperation with the State indicates the uncertainty of the line as it proceeds from his assumed north cape to Turning Point 160 of the international boundary line. The bearing given on the survey was N 63° 45′ E and Professor

Sherman, the Governor's representative, concluded it should be a nautical 'northeast', that is, N 45° E. Volume 4 of the Ohio Topographic Survey, 1933. The maps were compiled in 1910 and 1911, and from the evidence, no one complained about an incorrect line until 1933. (Mich. Exh. 9)

"47. To make a direct connection from the North Cape of Maumee Bay to the international boundary line the azimuth is 268° 58′ 55″.2 at the 1835 position of the North Cape of Maumee Bay. Map examining the position of several boundary lines connected with the settlement of the Ohio boundary question (Mich. Exh. 18). Tr 57

"48. The extension of the line from the North Cape as computed from the Talcott figures of 1835 to the international boundary line results in the intersection of the line from the south bend of Lake Michigan through the North Cape of Maumee Bay northeast to the international boundary at latitude (North) 41° 44′ 25″.220, longitude (West) 82° 48′ 43″.659 (Act of Congress, June 15, 1836, Mich. Exh. 10 and Rept. No. 380, Mich. Exh. 8, page 132) Tr 57

"49. Captain Talcott used accurate instruments, made multiple observations on numerous stars and finally made a careful mathematical analysis of his results before he concluded that '. . . the latitudes of the several points are true to the nearest second.' With these observations at hand, he calculated 'The arc joining the South bend of Lake Michigan, with the North Cape of the Maumee Bay' and found its azimuth at the South bend of Lake Michigan to be 266° 24′ 32″.6, whereas it was 268° 58′ 55″.2 at the North Cape. Tr 61."

RELIEF

Wherefore, it is prayed that recommendations of the Special Master be rejected or modified in accordance with exceptions set forth above.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

—VS—

STATE OF OHIO,

Defendant.

REPLY TO EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

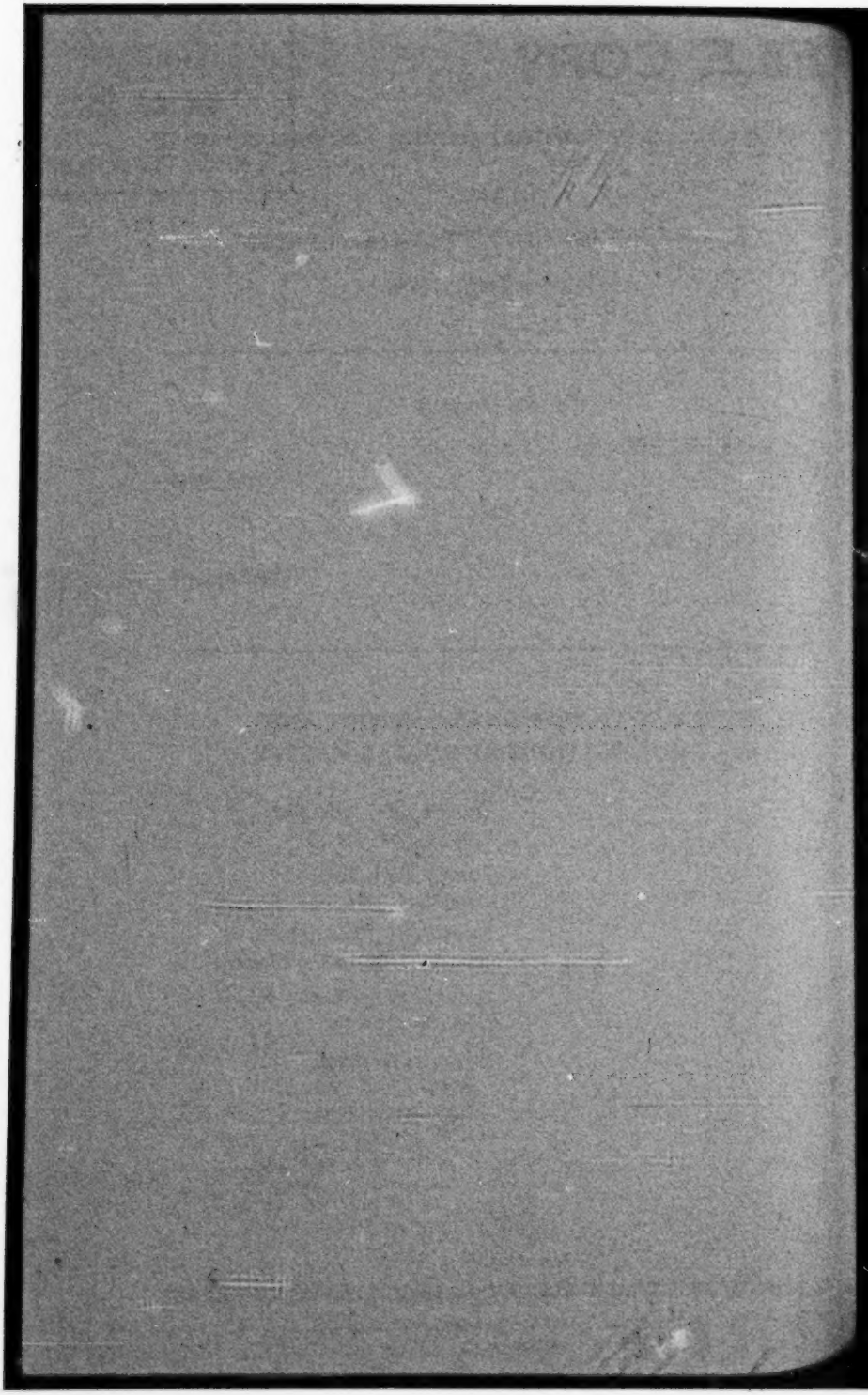
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

–VS–

STATE OF OHIO,

Defendant.

REPLY TO EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

TO THE HONORABLE
THE SUPREME COURT OF THE UNITED STATES

The State of Ohio, Defendant, by William J. Brown, its Attorney General, herein replies to the exceptions to Report and Recommendations of Albert B. Maris, Special Master, filed by Frank J. Kelly, Attorney General, State of Michigan.

I

The State of Michigan assigns as error the alleged failure of the Special Master to recommend a definition of the boundary line between Post 71, the easterly terminus monumenting the land boundary between Michigan and Ohio and the proper relocation of the north cape of the Maumee Bay as it existed in 1836. Michigan urges that the Special Master should have granted Paragraph No. 44 in Michigan's Proposed Findings of Fact.

The Special Master did conclude, in Finding of Fact No. 47, that the location of the north cape of Maumee Bay which Harris in 1817 determined to be the easterly terminus of the Ohio-Michigan land boundary as it existed in 1836, as closely as

it can now be ascertained, is the point now in the bed of Maumee Bay where a line drawn South 45° West through the center of the existing circular concrete sea wall on Turtle Island intersects a line drawn North 87° 49' 44" East from Post 71, the easternmost existing monument on the Ohio-Michigan land boundary line, both bearings being measured from a true meridian.

The Special Master states, on page 32 of his Discussion, that the land boundary, as monumented in 1915 under the auspices of the Joint Commission, as it approaches Post 71, follows a course having the bearing North 87° 49' 44" East. The Special Master further concluded that the same line extended eastwardly from Post 71 across Maumee Bay should pass through the 1836 location of the north cape of Maumee Bay since that was the original eastern terminus of the land boundary line. Thus the Special Master did define the boundary line between Post 71 and the north cape of the Maumee Bay or the point at which a line drawn South 45 degrees West through Turtle Island intersects the line extending eastwardly from Post 71.

The State of Ohio objected to proposed Finding of Fact of the State of Michigan 44 when it filed its Commentary upon proposed Findings and Conclusions of the State of Michigan on the ground that it was mere opinion testimony. We continue to object to it on that basis.

II

The State of Michigan excepts to Paragraph 2 of the Special Master's Recommended Decree. That Paragraph reads as follows:

> "2. In 1836 the north cape of Maumee Bay was located at the point in that Bay where a line drawn North 87° 49' 44" East from Post 71 on the Land boundary line between the States of Ohio and Michigan intersects the line drawn South 45° West from the center of the existing circular concrete sea wall on Turtle Island, both bearings being measured from a true meridian."

The State of Michigan further excepts to the failure of the Special Master to grant Michigan's request Findings of Fact Nos. 40, 41, 43 and 44. The Special Master correctly noted that the language in the act of June 15, 1836, 5 STAT. 49-50 determined the land boundary between Ohio and Michigan from the Indiana line to the north cape of Maumee Bay and also determined the boundary between the two states through the waters of Lake Erie easterly of the north cape of Maumee Bay. The language employed in the statute aforesaid is "and from the said north cape of the said Bay northeast to the boundary line between the United States and the Province of Upper Canada, in Lake Erie."

The bearing of the course starting at the North cape, by the plain meaning of the word "northeast" is North 45° East. This is also the meaning of the term as used by surveyors and in maps and charts of the day. It is the position of Defendant State of Ohio, that the most northerly cape of the Maumee Bay can be reestablished and ascertained by taking the point known to have intersected the line departing from said cape on the course North 45° East therefrom and reversing that course by running a line on the course South 45° West from said known point until the reverse line intersects the projection of the known and established land boundary line. The State of Ohio cited authority bearing upon this point in its brief filed with the Special Master.

The recommended findings of the State of Michigan ignore the term "northeast" in the statute referred to and represent a tortured construction which seems to [illegible] and the Special Master to be contrary to plain Congressional intent.

III

The State of Michigan assigns as error the Finding No. 41 of the Special Master and alleges that there is no evidence that a line drawn at Post 71 with a true bearing of South 87° 49' 44" West would ever strike the southerly extreme of Lake Michigan at present, in 1916, or in 1817.

Michigan further assigns as error the failure of the Special Master to grant that State's Findings Nos. 53, 54, 55 and certain portions of 56.

The Special Master noted that the bearing of the land portion of the boundary, at its easternmost monument, Post 71, is slightly northeasterly, being in fact, North 87° 49' 44" East, which is 2° 10' 16" North of East. The Master notes that, accordingly, if a statute had defined the line as running from the north cape of Maumee Bay in a northeasterly direction on a continuation of the same course as the land line to the international boundary line there would be force in Michigan's contention. There is, however, no such qualifying language in the act of 1836. The essential point to be considered is the fact that the statutes in question define the boundary to be a line northeast of the north cape of Maumee Bay and did not contemplate an extension from the southern tip of Lake Michigan in the same direction as the land boundary line. Under this theory the findings that Michigan wants included would seem to be not at all relevant to the basic issue in this case.

IV

Michigan assigns as error the inclusion by the Special Master in Paragraph 1 of the recommended degree the monument Turtle Island.

It is to be noted that Captain Talcott computed the latitude and longitude of the lighthouse station on Turtle Island (transcript Professor Berry, pages 52 through 54). It should be further noted that Michigan Exhibit 27 and Michigan Exhibit 8, pages 74 through 78, clearly show that Turtle Island is located at the Entrance to Maumee Bay. Further, the survey of the Maumee Bay under the direction of Captain W. S. Williams in 1844 shows the boundary line between Ohio and Michigan as beginning the course of North 45° East at the point described on the map as north cape. The boundary line shown on the Williams map following the course North 45° East from north cape bisects Turtle Island and is shown as either passing through the lighthouse on that island or very near to it. The map shows Turtle Island to have a total area of less than one acre. Ohio Exhibits 1, 2 and 3. The Ohio General Assembly joint resolution in 1933 and the identical resolution passed by the Michigan legislature in 1945 refers specifically to Turtle Island.

V

Michigan further assigns error to the Special Master in not finding the quoted portion of Michigan's request for Finding of Fact No. 34. This, basically, is the authorization in 1828 for a survey to be made of intermediate points between certain lines and the Memorial of the Ohio General Assembly which deals directly with the bearing across Lake Erie to its intersection with the northern boundary line of the United States.

Michigan does not state the reasons why it believes this particular finding should have been included. We admitted this particular allegation in our Commentary upon proposed findings of fact of the State of Michigan originally filed with the Special Master but took the position that it was neither relevant nor material to this litigation. We reiterate that position.

VI

Michigan alleges that the Special Master erred in his Recommended Decree Paragraph one. It is the position of the State of Ohio that, as stated previously, Paragraph one of the recommended decree represents a correct construction of the statutes and the plain and unambiguous meaning of the term "northeast".

VII

The State of Michigan excepts to the declaration of the Special Master beginning on page 27 of the Special Master's Report. Suffice it to say that all of the allegations in that declaration are supported by documentation in evidence in this proceeding as well as by sound legal construction.

The State of Michigan also alleges error by the Special Master in Finding No. 46 and the discussion concerning that finding beginning on page 29 et seq. of the Report of the Special Master. This finding and discussion relates to the fact that later maps have likewise indicated the boundary in Lake Erie between the two states as running North 45° East.

The Finding and Discussion of the Special Master is fully supported by the evidence. Ohio Exhibit No. 4 is a map of the "Erie Quadrangle", United States Department of Interior, Geological Survey. It was published in 1952 and bears the notation at the top of the Michigan State Highway Department, Charles M. Ziegler, State Highway Commissioner.

Ohio Exhibit No. 5 depicts the "Oregon Quadrangle", United States Department of Interior, Geological Survey, published in 1965.

Both Ohio Exhibits No. 4 and 5 portray the Ohio-Michigan boundary in Lake Erie and both clearly show that boundary as extending from Post No. 71 to the north cape of Maumee Bay and extending North 45° East.

VIII

The State of Michigan further excepts to Finding No. 38, page 18, in the Special Master's Report. This Finding relates to the Williams survey of 1844. The Williams survey is in evidence as Ohio Exhibits Nos. 1, 2 and 3 and that survey does show the boundary line between Ohio and Michigan as beginning a course of North 45° East at the point described on the map as north cape. The boundary line shown on the map following that course from north cape bisects Turtle Island, and is shown as either passing through the lighthouse on this Island or very near to it.

The State of Michigan further assigns as error the failure of the Special Master to find the requested Findings of Fact of the State of Michigan Nos. 45, 47, 48 and 49. In the Commentary of the State of Ohio upon these findings filed with the Special Master we objected to them on the ground they were conclusionary and based by and large upon the opinion testimony of Professor Berry, which testimony we dispute. Our answer to Michigan's contention may be based simply upon the plain meaning of the term "northeast" in the statutes of 1835-36. One does not have to go through a construction and interpretation of the Talcott survey to ascertain the plain meaning and intention of Congress.

RELIEF

WHEREFORE, it is prayed that the recommendations of the Special Master be approved in accordance with the Findings, Conclusions, and Recommended Decree of said Special Master and that a decree be entered by this court in conformance therewith.

WILLIAM J. BROWN
ATTORNEY GENERAL
STATE OF OHIO

BY

JOSEPH M HOWARD AND
CHARLES S. RAWLINGS
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1972
No. 30 Original

STATE OF MICHIGAN,

Plaintiff,

—vs—

STATE OF OHIO,

Defendant.

BRIEF FOR PLAINTIFF IN SUPPORT OF EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER TAKEN BY THE PLAINTIFF AND DEFENDANT

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TABLE OF CONTENTS

Page

Statement of the Case 1

ARGUMENTS NOTED 4

Argument 1. (A) Has the State of Michigan proved a superior method to relocate the north cape of Maumee Bay as it existed in 1836? 4

Argument 1. (B) Has the State of Michigan proved the only line which conforms to the Statute (Act of June 15, 1836) is a line drawn from the north cape of Maumee Bay to the international boundary line and is a straight line from the southern extreme of Lake Michigan through the north cape of Maumee Bay to the International Boundary between the Dominion of Canada and the United States? 9

Argument 2. In 1836 the north cape of Maumee Bay was located at the point in that bay where a line drawn north 87° 49′ 44″ east from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the circular concrete seawall on Turtle Island, both bearings being measured from a true meridian. 18

TABLE OF AUTHORITIES

	Page
Groeneveld v. Camano Blue Point Oyster Co. 196 Wash 54, 60, 81 P2d 826, 829	12
Fosburgh v. Sando 24 Wash 2d 586, 588; 166 P2d 850, 851	12
Bonded Adjustment Co. v. Edmunds 28 Wash 2d 110, 111; 182 P2d 17	12
Simmons Creek Coal Company v. Doran 142 US 417	19
Ayers v. Watson 137 US 383	19

CONSTITUTION AND STATUTES

	Page
5 Stat 49	2
5 Stat 56-57, Act of June 23, 1836	2
Constitution of Ohio of 1802	10

OTHER

	Page
Clark on Surveying and Boundaries, Third Edition John S. Grimes	8
Address to Michigan Association of Surveyors and Civil Engineers; Lansing, January 11-13, 1881	9

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BRIEF FOR PLAINTIFF IN SUPPORT OF EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER TAKEN BY THE PLAINTIFF AND DEFENDANT

Statement of the case

The present controversy involves the location of that portion of the boundary line between the States of Ohio and Michigan which runs from Post 71, a monumented position on the shore of Maumee Bay, through the waters of Lake Erie eastward to a point which was the location of the most northerly cape of Maumee Bay in 1836 and from that point on the cape, which has long since eroded to the north, to the terminus of the boundary between the Dominion of Canada and the United States. The erosion of the north cape of Maumee Bay makes the precise position which that point occupied in 1836 an essential part of this controversy. (M.R. 31)

The boundary between these states was established by the Congress by the Act of June 15, 1836, 5 Stat. 49, 50 (M.R. 27), which provided for the admission of the State of Michigan into the Union. That Act provided "That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) Bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said mentioned line, to its intersection with the western line of the State of Pennsylvania." The People of the State of Michigan, through the vote of a convention of elected delegates on December 15, 1836, assented to the foregoing boundary line (M.R. 17).

The two states do not agree upon the meaning and application of the words "a direct line drawn from the southern extremity of Lake Michigan to the most northerly cape of the Maumee (Miami) Bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie;". Congress passed an Act eight days after they had accepted, ratified and confirmed the Constitution and State Government of the State of Michigan and declared Michigan to be one of the United States of America. That subsequent Act of June 23, 1836 provided: "That the northern boundary of the State of Ohio shall be established by, and extend to, a direct line running from the southern extremity of Lake Michigan to the most northerly cape of the Miami bay; thence, northeast, to the northern boundary line of the United States; thence with said line, to the Pennsylvania line." 5 Stat 56-57.

It is the contention of Michigan that the statute does not call for an angle in the boundary line at the north cape and that "northeast" as there used means in the same northeasterly direction as the land line, that is, a continuation or extension of the land line on a course having the same bearing as that line. Ohio, on the other hand, contends that the statutory language indicates that the boundary takes a new course at the north cape and that the bearing of that course, defined as "northeast", must, in the absence of qualifying language, be taken to be due northeast, that is, North 45° East.

Within this controversy there is no dispute as to the location of the land boundary, it having been settled since 1915. Both states by a joint commission, established and monumented the boundary between them from the westernmost part of the northern boundary of Ohio to the easternmost terminus. The eastern terminus of this boundary was set at Post 71 near the west shore of Maumee Bay approximately two miles westerly from the North Cape (TR 69-74). The land boundary zig zags from west to east and does not adhere to the boundary line as described in the statute. However, it is a practical line. The location of the northern cape of Maumee Bay is material because it is provided that the boundary line should run from it to the international boundary line. (M.R. 32) (TR 69-70)

The State of Michigan contends that Captain Andrew Talcott, in his survey authorized by Congress and the Executive in 1832, gave precise geographic data to locate the north cape (TR 45). Utilizing those figures and the newer found figures about the size of the earth, the 1836 position of the north cape can be accurately determined (TR 46). The boundary would then be drawn from Post 71 to this redetermined position of the north cape of Maumee Bay as it

existed in 1836, thence to the international boundary as previously contended for by Michigan.

The State of Ohio contends that the position of the north cape is found by the intersection of a line drawn S 44° 52′ 53.″6 W from the concrete wall on Turtle Island with a line drawn with the bearing of N 87° 49′ 44″ through Post 71 extended into Maumee Bay, thence N 45° to the international boundary (M.R. 29).

Argument

1. Directing the Court's attention to Michigan Exceptions to the Report and Recommendations of the Special Master as marked therein I, II, and III:

(A) Has the State of Michigan proved a superior method for relocation of the northerly cape of Maumee Bay as it existed in 1836?

(B) Has the State of Michigan proved that the only line which conforms to the Statute (Act of June 15, 1836) is a line drawn from the north cape of Maumee Bay to the international boundary line and is a straight line from the southern extreme of Lake Michigan through the north cape of Maumee Bay to the International Boundary between the Dominion of Canada and the United States of America.

2. Did the Special Master err when he concluded that Turtle Island must be a monument over which the northern boundary of Ohio must pass as it proceeds northeasterly to the International Boundary?

1. (A) Has the State of Michigan proved a superior method to relocate the north cape of Maumee Bay as it existed in 1836?

Michigan answers this question, YES

Witness Berry testified directly giving the reason for finding the North Cape as it existed in 1836 (TR 73-75) and further the method by which to locate it. Ralph M. Berry was qualified as a surveyor and an expert of geodetic engineering both as to education and experience, and to practice. (TR 19-27, 39-46, 131, 135 et seq, 139 et seq.) The expertise goes well into all phases of the witness' testimony and no objections were raised about the qualifications of the witness on any point.

Witness Berry knew the documents surrounding the legislation of 1836. From these documents he concluded that the survey by Captain Andrew Talcott afforded the best method to relocate the north Cape of the Maumee Bay. (TR 45 et seq 50). Further, by tracing the history of Turtle Island, and the figure and base of the island, Witness Berry computed a geodetic latitude and longitude for the 1835 position of the North Cape. (TR 54 et seq) Witness Berry's computation of the 1835 position of the North Cape of Maumee Bay is:

Latitude (North): 41° 44′ 02″004

Longitude (West): 83° 24′ 56″923

The specific reason for this identification is a physical feature of Maumee Bay in 1835. At that time, its location was both a physical fact and a mathematical location. Nothing in the record shows that any part of the North Cape had eroded between 1835 and 1836.

This methodology is based very closely to the original thinking expressed by Congress in 1836 (contained in 5 Stat 49-50). The Congress in that act gave two physical features that it wanted incorporated in the boundary, the

southern extremity of Lake Michigan and the North Cape of Maumee Bay.

From the time of the Ohio Constitutional Convention of 1802, the whole contest was to control Maumee Bay. Prior to 1802 and until Captain Andrew Talcott performed his services for the Congress, relatively little was known of the tract of land known as the northwest part of the United States. The maps of the times from 1750 to 1802 illustrate this concept. (See Mich Exhibit 7, Senate Document 211, pages 12 et seq, Congressional Set Series 281) The debates in Congress and the surveys required by Congress illustrate the concept from 1802 to 1832.

After the Ohio Constitutional Convention there was much agitation for the settlement of the northern boundary of Ohio. This began with discussions in Congress in 1803 about the acceptance of the Ohio Constitution and execution of the laws of the United States. Congress did not decide the extent of the northerly jurisdiction of Ohio at that time. Finally, in 1805 Congress enacted territorial legislation for the country north of a stated east-west line of the State of Ohio. At this time, a conflict would have been apparent if the Congress had known that it did not coincide with the proviso in the Ohio Constitution of 1802. (M.R. 25-26) Mich. Exhibit 8.

Between 1810 to 1820, two separate surveys, the Harris and the Fulton, were made (Exhibits 13, 14, 15) to determine what Congress meant by the acceptance of the Ohio Constitution and the Act to Enable The Territory Of Michigan To Be Formed. For many reasons Congress rejected the approval of these surveys. In 1828, a Congressional Committee declared what was needed to settle the boundary issue was a survey done by a competent engineer with competent aids. By means of the Act of July 14, 1832 Congress

gave the approval for this survey. By executive order Captain Andrew Talcott was engaged to locate the northerly cape of Maumee Bay and the southern extreme of Lake Michigan.

The Special Master determined that the 1836 North Cape of the Maumee Bay can be relocated with precision. However, he erred when he did not include in the definition of the boundary between the two states a line which closes the 1836 position of the North Cape of Maumee with Post 71 on the western shore of Lake Erie. Post 71 is a cement monument laid on the ground to mark the spot where commissioners from each state determined where the land boundary ended. The evidence is that Post 71 is 3 to 4 kilometers from the location of 1836 position of the North Cape of Maumee Bay. (TR 73 et seq, 69)

Clearly, neither Ohio nor Michigan nor the Special Master recommend that Post 71 is the point from which the direct line should be drawn to the International Boundary. Michigan urges the adoption of the Talcott survey. Ohio and the Special Master contend that the line drawn from Post 70 through Post 71 would intersect a line drawn S 44° 52′ 53.″6 W from Turtle Island at the point which would be the 1836 position of the north cape. (M.R. 34-35) Obviously this represents a compromise on the part of each state, the subject matter of which has not been before Congress, let alone approved by it.

Arguendo, the Harris line followed by the commissioners was supposed to be a straight line, but, as resurveyed and found to be the boundary, it was not. To the extent that it was not a direct line and to the extent that the line drawn by Ohio and recommended by the Master does not form a tangent to the Southern extreme of Lake Michigan, a compromise has been reached by both the joint commissioner and

the State of Ohio and the Special Master. To further tangle the matter there is no authority to draw a line S 45° W from the center of a lighthouse on Turtle Island. In point, the fact established by the Special Master, the 1835 position of the north cape of Maumee Bay, is 3,177.3 yards in distance from the lighthouse on Turtle Island in the direction of S 44° 52′ 53.″6. (MR 15)

The State of Michigan relies heavily on its pleadings, the evidence, her Requested Findings of Fact, her letter to the Special Master and argument to prove that the Special Master was cognizant of the undefined gap between Post 71 and the 1836 location of the north cape of Maumee Bay. (Article IV, Complaint; TR 73-75, Mich Ex 30, map 9; Proposed Findings of Facts of the State of Michigan No. 44, page 2; Letter to Judge Maris dated March 18, 1971; TR 126-128) From all the foregoing, the State of Michigan cites as the practical and legal consequence of these facts the following surveying rule:

". . . And it is the universal rule that courses and distances must yield to actually existing monuments, *or to the site of their former location, if that has been clearly established. . . .*" (emphasis supplied) Clark on Surveying and Boundaries, Third Edition by John S. Grimes, Sec. 314, p. 342.

Quoted from the classic work of Justice Thomas M. Cooley is the following:

"When the witness-trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor. It is by no means uncommon that we find men, whose theoretical education is thought to make them experts who think that when the monuments

are gone, the only thing to be done is to place new monuments where the old ones should have been, and would have been if placed correctly. This is a serious mistake. The problem is now the same that it was before: To ascertain by the best lights of which the case admits, where the original lines were. . . ." The Judicial Functions of Surveyors. Justice Thomas M. Cooley. Delivered at the second meeting of the Michigan Association of Surveyors and Civil Engineers, Lansing, January 11-13, 1881.

Wherefore, the State of Michigan concludes that the Special Master erred in his selection of the 1836 position of the North Cape and that the State of Michigan put in adequate and substantial proof as to its existence and kept the matter timely before the Special Master.

1. (B) Has the State of Michigan proved that the only line which conforms to the statute (Act of June 15, 1836) is a line drawn from the North Cape of Maumee Bay to the International Boundary Line and is a straight line from the southern extreme of Lake Michigan through the North Cape of Maumee Bay to the International Boundary between the Dominion of Canada and the United States of America.

Michigan answers this question, YES!

The entire controversy must be understood historically. Various states had ceded land to the United States, said land to be known as the Northwest Territory. The vast extent of this territory was not known. The people on the eastern shores were confronted with the revolution. The visionaries among them knew this northwest territory must be governed. The Congress, therefore, set about this government of the territory. It passed the Northwest Ordinance in 1787. (MR 5)

To set the bounds of local governments within this territory, the available maps were used. These maps were inaccurate, as events turned out, but the extent of the inaccuracy did not reveal itself fully until long after the Ohio Constitutional Convention of 1802. Congress in 1802 set the same northern boundary for Ohio as was proposed in the Northwest Ordinance.

The people who gathered at the Ohio Constitutional Convention heard that the longitude of the southern extreme of Lake Michigan was southerly of the mouth of the Maumee Bay at Lake Erie. Thus, to protect themselves from the loss of this important transportation point, (Mich. Exhibit 7, p. 9, 15, 16; Mich. Exhibit 8, p. 6, 17) they included in the Constitution of Ohio of 1802 the following language:

"Provided always, and it is hereby fully understood and declared by this convention, that if the southerly band or extreme of Lake Michigan should extend so far south that a line drawn due east from it should not intersect Lake Erie, or if it should intersect said Lake Erie east of the mouth of the Miami River of the Lake, then and in that case, and with the assent of the Congress of the United States, then the northern boundary of this state shall be established by and extended to, a direct line running from the southern extreme of Lake Michigan to the most northerly cape of the Miami Bay, after intersecting the due north line from the mouth of the Great Miami as aforesaid; [The western boundary of the new State] thence northeast to the said territorial line, to the Pennsylvania line." (MR 9)

Elsewhere in this brief, it has already been shown that uncertainty of the northern boundary of Ohio existed from the time of this proviso. Surveyors Harris and Fulton ran two separate surveys, but no survey really determined all the matters needed to fix the line until the Congress, with

full recognition of the inadequacies it had had when the boundaries were first called, passed the Act of June 15, 1836. Immediately preceding the introduction of this bill, which became Act of June 15, 1836, the survey of Captain Andrew Talcott was transmitted to Congress. (TR 43 et seq, Mich. Exhibit 6, p. 34 & 35 of Senate Journal; p. 42 & 43 of House Journal.)

The first analysis of that statute must concern itself with the word "northeast". The word first appears in the Ohio Constitution, and then the statute of June 15, 1836. Certainly in 1802 there was no reason to intend a change in bearing at the northerly cape of the Maumee Bay. The land transportation point had been protected. If anything, this term was inserted to make it known that a change in bearing was not contemplated in the previous statute, Ohio Enabling Act. Previously the line had gone due east from the southerly extreme of Lake Michigan to Lake Erie. If there were no directions to be followed from the northerly cape, the normal way to go would be that the line would then be a line from the northerly cape due east from the Maumee Bay to the boundary between the United States and Canada. (Mich Exhibit 8, p. 18)

Beyond the particular meaning of the word 'northeast' are there any signs as to whether a bearing is intended? Certainly the idea that the master concluded that northeast must be N 45° E because this line would bisect Turtle Island must be disregarded. Ample evidence is in the record in this case, and also was before Congress, so that if Congress decided to change the meaning of the Ohio's proviso it would have expressly stated that the line would be a line from the northerly cape of Maumee Bay through Turtle Island to the boundary between the United States and Canada. No evidence in the record would acknowledge that the mouth of the Maumee Bay must be protected by a line

through Turtle Island. (Mich Exhibit 7, pp. 1-17; Mich Exhibit 8, pp. 15-17)

It is equally as evident that if the statute had defined the line as running in a northeasterly direction through the existing lighthouse on Turtle Island, then there would be force in the Special Master's Recommended Decree. The fact of the matter is that Turtle Island is a witness to the north cape and that was certainly a fact before Congress because Captain Andrew Talcott used Turtle Island as an accessory to locate the north cape. The insertion of Turtle Island as a call in the description of the boundary is judicial legislation and is irrelevant to the meaning of 'northeast'. It should be noted that Congress directed that only the location of the north cape of the Maumee Bay be found and to have the observations returned to the proper department. (Mich Exhibit 8, pp. 15-17)

The Special Master desires to give precision to effectuate the Congressional purpose. The Congressional purpose in the Acts of 1836 could not have intended to grant to Ohio any more territory than that state already claimed. (Mich Exhibit 7, pp. 14-15) This was the report of the Committee of the Judiciary while considering a resolution about Ohio's legal rights and was in addition to the bill to settle the boundary and admit Michigan to the Union. The entire purpose of this legislation regarding the northern boundary of Ohio was to give jurisdiction over Maumee Bay to Ohio. (Mich Exhibit 8, p. 17) The term 'northeast' is similar to 'northwesterly' as described in a statute of the State of Washington and 'northerly' in description in conveyances and memoranda of decision in the same state. *Groeneveld* v. *Camano Blue Point Oyster Co.*, 81 P2d 826, 829. *Fosburgh* v. *Sando*, 166 P2d 850, 851. *Bonded Adjustment Co.* v. *Edmunds*, 182 P2d 17,17. The Supreme Court of Wash-

ington says that the terms 'northerly' and 'northwesterly' are general terms.

The concept of northeast being a general adjective will not be a newly advanced theory to the court in its review of the recommendations by the Special Master. On page 14, Reply to Commentary upon the Proposed Finding of the State of Ohio, Brief and Argument in ~~Support of~~ Proposed Findings of Fact of the State of Ohio, Proposed Findings of Fact and Conclusions of Law of the State of Ohio, the State of Michigan informed the Special Master that the American Dictionary of English Language, Vol. II, (1828) defines northeast: "Nother'ast, a. Pertaining to the northeast, or proceeding from that point; as a northeast wind." Therefore, as a general proposition the term northeast should mean a northeast line as the precise direction was not known when the problem was first anticipated in 1802 and from which Congress made no substantial changes. Section 2, Ohio Constitution, 1802, Acts of June 15, 1836 and June 23, 1836. It is most conceivable that the conventioneers were trying to protect themselves from an error of about twelve miles, over the course of a distance of an unknown quantity of miles. It was because Congress assented to the provision offered by Ohio that no terms were changed. Exhibit 7, Sen. Doc. 211, p. 13.

At the argument on April 1, 1971 in the informal discussion on page 145, Mr. Berry brings out that there is no necessity for the boundary line to bisect Turtle Island because Turtle Island is not a monument in any description of the boundary given by Congress. The Special Master adverted to the fact that it was a convenient fixed monument. To the extent that it becomes a monument through which a line must pass to define the meaning of the term 'northeast' as such term appears in the call in the statutes,

Michigan responds that this is irrelevant. Turtle Island happens to be close to a bearing of North 45° East from the North Cape and therefore the term 'northeast' must mean North 45° East. If the Congress had intended this, there was ample opportunity to insert this provision in the call and it would have either inserted North 45° East or mentioned Turtle Island.

Lastly, if the Congress had intended to change the bearing there was ample time in which to discuss it. Beginning with the statute to enforce the federal law in the State of Ohio (1803) down to 1836 there was no mention of a change in direction at the north cape. Particularly in the Strong report in 1828, Mich. Exh. 1, the Congress wanted to know precisely the position for the southern extreme of Lake Michigan and the location of the North Cape. Had they wanted at that time to include Turtle Island as a monument through which the line might pass, it would have been mentioned. Turtle Island becomes relevant only as a reference point to locate the north cape. It became convenient for a later surveyor marking the depth of the water and configuration of the shoreline to show it as the boundary line. He had, however, no congressional sanction. (TR p. 134)

Later, contemporaneous maps have mischieviously crept in to interpret the statute. The first map is in 1844 by Captain Williams. The Special Master had before him the testimony of Professor Berry regarding the conclusions reached by Captain Williams. The testimony related that Captain Williams' job was to assemble information concerning the configuration of the shoreline, the depth of the water in Maumee Bay for the purpose of studying needs for engineering works and guidance for navigation. The field books of Captain Williams' 1844 study show no notation of any boundary marks recoverable by him. There

is no evidence that he had authority from Congress or any superior to establish this line or that he had any competence to determine what Congress had said the boundary was to be. TR 134 and 135.

The informal discussion before the Special Master indicated that the only purpose for which the map could be used was that it showed a line in 1844 marked N 45° E from the north cape through Turtle Island. The line marked N 45° E is not the same as called for by the statute and as referred to by Witness Berry. The statute calls for 'northeast'. It does not say in so many words 'North 45° East' as depicted on the exhibit.

At the argument before the Master the matter of Captain Williams map was brought up, and the Special Master indicated the purpose of the map was limited to show where a line north 45° east would run. As a matter of competence to show the legislative purpose of the term northeast it was ruled that the line was not binding on anyone. The title of the line should not be rendered binding in this case.

The Special Master determined a congressional purpose in the use of the term "northeast". Granted the dictionary definition of northeast meant midway between north and east, but the dictionary was published just slightly before the enactment of the statute. The general usage of the term beyond that was not evidenced. However, to bolster this definition, as to the Congressional purpose, an after the fact map was invoked.

The State of Michigan has excepted to Finding No. 38, page 18, in the Special Master's Report. This Finding relates to the Williams survey of 1844. The Williams survey is in evidence as Ohio Exhibits Nos. 1, 2 and 3 and although that survey does not show a boundary line between Ohio

and Michigan as beginning a course of North 45° East at the point described on the map as north cape, it is not complete. The boundary line shown on the map following that course from the north cape bisects Turtle Island, and is shown as either passing through the lighthouse on this Island or very near to it. It does not go west of the north cape.

The State of Michigan further assigns as error the failure of the Special Master to find the requested Findings of Fact of the State of Michigan Nos. 45, 47, 48 and 49.

Failure to grant Michigan's requested Findings of Fact Nos. 47, 48 and 49 must have been on the basis that there was no evidence or that there was no relevancy. MR 25. The relevancy of Nos. 45, 47 and 48 go to support the conclusion which Michigan has well pleaded. Complaint Article V and VI, Exhibits 18, 10, and page 132 of the transcript, are evidence sustaining this position. The transcript of Witness Berry's testimony beginning at page 57.

> "Starting with the computed latitude and longitude of the 1835 position of the North Cape, derived as previously described, a line in azimuth 268° 58′ 55.2″ is computed to intersect the International Boundary Line between Turning Points 159 and 160 at:
>
> latitude (North): 41° 41′ 25″.220
>
> longitude (West): 82° 48′ 43″.659
>
> Which position is:
>
> 50,227.42 meters from the North Cape
>
> 13,096.45 meters from Turning Point 159
>
> 25,371.15 meters from Turning Point 160

Above intersection and lengths are computed on the North American Datum of 1927."

"Captain Talcott used an accurate instrument and made multiple observations on numerous stars and finally made a careful mathematical analysis of his results before he concluded that '. . . the latitudes of the several points are true to the nearest second.' With these observations at hand, he calculated 'The arc joining the South bend of Lake Michigan, with the North Cape of the Maumee Bay' and found its azimuth at the South bend of Lake Michigan to be 266° 24′ 32″.6, whereas it was 262° 58′ 55″.2 at the North Cape. Although there is no information available to identify the figure (size and shape) of the earth adopted by Captain Talcott, a rough computation checks this change of azimuth within approximately one minute of angle. It is concluded, therefore, that Captain Talcott's survey provides a superior means of retracement of the 1835 position of the North Cape, and a positive indication of the intent of Congress when the act of 15 June 1836 was passed because it was before the Congress as a result of the directives of the act of 14 July 1832, pursuant to which Captain Talcott made his survey."

Ohio, in her reply to the Michigan Exceptions and Recommendations, disputes Witness Berry. Nowhere in the evidence does Ohio challenge any statement made by Witness Berry. To the extent that Ohio believes these were conclusions drawn by Witness Berry, Michigan says that Berry was on the stand and Ohio did not subject him to test cross examination. Further, there were no objections as the testimony went into evidence. These were opinions supported by a foundation in evidence and were within the expertise of the witness, Professor Berry.

2. Did the Special Master err when he concluded that Turtle Island must be a monument over which the northern boundary of Ohio must pass as it proceeds north easterly to the International Boundary?

Michigan answers YES.

Michigan submits that the Special Master begins his error in Recommended Decree, paragraph 2:

> **"2. In 1836 the north cape of Maumee Bay was located at the point in that bay where a line drawn north 87° 49′ 44″ East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian."**

and by failing to grant Michigan's requested Findings of Fact Nos. 40, 41, 43 and 44.

The Special Master erred in the Recommended Decree, paragraph two when he recommended that the North Cape of the Maumee Bay in 1836 was located at a point in the bay where a line drawn N 87° 49′ 44″ E from Post 71 on the land boundary line between the States of Ohio and Michigan as such line intersects a line drawn S 45° W from the center of the existing circular concrete seawall on Turtle Island. No supporting testimony or exhibits were offered by Ohio dealing with an original coherent survey to support this determination or to rebut Michigan's submissions for the solution to the problem. It is a well established legal principle that in order to conduct a retracement to find a lost or missing monument in a call, a surveyor must use the best evidence available.

The State of Michigan, having taken issue with paragraph two in the Special Master's Recommended Decree goes further to add that the Special Master's error was compounded by failure to grant Findings requested by the State of Michigan. The only solid evidence to recapture the position of the north cape of Maumee Bay as it existed in 1836, since washed away, consists of the data supplied by Captain Andrew Talcott and interpreted by the Michigan Witness Berry.

The geodetic determination of Turtle Island by the United States Corps of Engineers, Lake Survey District in the year 1961 provided the beginning. Witness Berry thoroughly examined the locus, Turtle Island and government records thereto, and concluded that the present ruin occupies essentially the same site as the original lighthouse. (Tr 50-51) Thus, the beginning point having been established, the geodetic latitude and longitude was computed for the 1835 position of the North Cape. (Tr 54) Captain Talcott did not identify the figure of the earth, but the testimony indicates that from the Southern extremity of Lake Michigan to the computed position of the North Cape the change of azimuth would be approximately one minute of angle. The expert testimony of Witness Berry, based on facts in evidence at the hearing concluded that Captain Talcott's survey provides a superior means of retracement of the 1835 position of the north cape.

Witness Berry, as a surveyor, and as a part time consultant to United States Lake Survey, testified that pursuant to a 1961 determination by the United States Lake Survey District, a geodetic determination was made of the latitude and longitude of the presently existing lighthouse structure on Turtle Island. By examination of the records and procedures used by this group, Witness Berry concluded that this was a position of adequate accuracy which

could be used as a base for computing the latitude and longitude of the 1835 position of the North Cape of Maumee Bay. In the informal discussions with the Special Master in Philadelphia, April 1, 1971 this conclusion was urged.

In a revised draft of a report of the Special Master, March 12, 1972, Finding No. 40 was included. It conflicts with the ultimate finding made by the Special Master to relocate the North Cape of Maumee Bay. The fact of the matter is that the evidence points directly to the conclusion of Requested Finding No. 40 which request was for a physical fact that has been reduced to a known geodetic computation which, knowing the place of beginning, the angle from which to start, and the distance to draw the line, this finding should have been granted to locate the north cape. It matters not that it comes into the water. The one selected by the Master goes into the water also. The procedures are different, and Michigan uses accurate measurements to relocate the 1836 position of the North Cape of Maumee Bay and the Special Master does not.

Certainly in order to relocate corners of a survey the doctrine of reversing the course is perfectly proper. However, in order to recover the point, that point must first appear in the survey from which the point is relocated. To run the line back S 45° W from Turtle Island does not recover any point on the Harris survey. The principle of *Simmons Creek Coal Company* v. *Doran*, 142 US 417 and *Ayers* v. *Watson*, 137 US 384 is inapplicable. This principle is applicable only in the event you refer to Captain Talcott and his survey with ample field notes to draw a map to indicate Turtle Island, the direction and distance to the northerly cape of the Maumee Bay, as it was a reference to the northerly cape as directed by Congress.

When Ohio utilizes this concept of reversing the course

of the survey, as does the Special Master, they assume that Harris included Turtle Island and that Turtle Island was part of a call known by Congress in 1836 in adopting the term northeast. Both Ohio and the Special Master have assumed that Turtle Island was within the Harris survey. The location of the point of the Northerly Cape of the Maumee Bay was not established when both the Special Master and Ohio interjected the Turtle Island monument in the call. At the most, Turtle Island is a mere accessory to locate the Northerly Cape of Maumee Bay as witnessed by Captain Talcott. Nevertheless, to buttress their argument that "northeast" means N 45° E they in turn rely on the fact that in running S 45° W from the Turtle Island, they recover the North Cape of Maumee Bay. Thus the use of this principle of reversing directions is not relevant to this case.

Having determined the location of the North Cape of Maumee Bay, it becomes necessary to reconsider the construction of the term "thence northeast" as it is found in the Act of June 15, 1836. The record in this case contains nothing positive to show that Congress intended to have the line pass over Turtle Island. The relevance of Turtle Island at the time Congress passed the statute is for the location of the North Cape of Maumee Bay. It is only fortuitous that a line N 45° E from the north cape passes over Turtle Island. Captain Williams discovered this occurence, but this court should not dignify it by making it the law of this case.

SUMMARY OF ARGUMENTS

The northerly cape of the Maumee Bay as it existed in 1836 and computed for the year 1927 is:

Latitude (North): 41° 44′ 02″.004

Longitude (West): 88° 24′ 56″.923

The basis for this rests with the only solid evidence taken at the hearings. Captain Andrew Talcott precisely figured the location of this position in 1835 and Ralph M. Berry computed the position according to North American Datum of 1927.

Any other determination of this position errs because of known errors in the surveys or in the result of a compromise between the states.

Turtle Island, wherever it lies in relation to the North Cape of the Maumee Bay as it existed in 1835 was not a call in the statute of June 15, 1836 nor is it a proper call today. The relevance of Turtle Island in this case is to locate the point of the north cape of Maumee Bay as it existed in 1836.

The State of Michigan has proved by a preponderance of the evidence that the northern boundary is a line which begins at the southerly extreme of Lake Michigan as it existed in 1836 to the northerly cape of Maumee Bay and extended to the line between the United States and Canada. The historic evidence adduced by the State of Michigan overwhelms any conclusion to be drawn by contemporaneous surveyors whose authority to interpret the line is questionable.

Alternatively to the strict interpretation of the statute as requested by Michigan, the Court may decide that an equitable division of the waters of Lake Erie was uppermost in the minds of Congress in 1836. In private matters a way to do this would be to determine the area of Lake Erie around a relevant coastline on Lake Erie. Beginning at a point on the location of the Maumee Bay as it existed in 1836, then direct a line to the boundary between the United States and Canada so that such line would equally divide the water.

PRAYER

The State of Michigan seeks to have this Court review the record in this case made, reverse the judgment of the Special Master and assert that the boundary line between the States of Michigan and Ohio is an arc drawn from Post 71 to the northerly cape of Maumee Bay, located at

Latitude (North): 41° 44′ 02″.004

Longitude (West): 83° 24′ 56″.923

and thence extending on an azimuth 268° 58′ 55.2″ to intersect the International Boundary Line between Turning Points 159 and 160 at

Latitude (North): 40° 41′ 25″.220

Longitude (West): 82° 48′ 43″.659

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Supreme Court, U. S.
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NO. 30 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM 1966

STATE OF MICHIGAN, PLAINTIFF

v.

STATE OF OHIO, DEFENDANT

BRIEF FOR DEFENDANT IN ANSWER TO EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER TAKEN BY THE PLAINTIFF AND BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

	Page
Questions Presented	1
I. Did the Special Master correctly find and conclude that the north cape of Maumee Bay was located in 1836 at the point in that bay where a line drawn north 87° 49' 44" East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian?	1
II. Did the Special Master correctly find and conclude that the boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836, on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada?	2
III. Did the Special Master correctly conclude that the existing seawall on Turtle Island establishes that as a permanent monument on the boundary line between the two states in Lake Erie?	2

Page

Statement of the Case 2
Summary of Argument 4
Argument 5

I. Did the Special Master correctly find and conclude that the north cape of Maumee Bay was located in 1836 at the point in that bay where a line drawn north 87° 49' 44" East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian? 5

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III. Did the Special Master correctly conclude that the existing seawall on Turtle Island established that as a permanent monument on the boundary line between the two states in Lake Erie? 15

Conclusion 19
Certificate of Service 20

TABLE OF AUTHORITIES

	Page
Ayers v. Watson 137 U.S. 384	9, 19
Bonded Adjustment Co. v. Edmunds 182 P. 2d 17	12, 13
Brandt v. Ogden I Johns R. (New York) 156, 158 (S.C. 1806)	12
Chinoweth v. Haskell 28 U.S. (3 Pet.) 92, 96 (1830)	14
Currier v. Nelson 96 Cal. 505, 508, 31 P. 531, 532 (1802)	12
E. E. McCalla v. Sleeper 105 Cal. App. 552, 569, 288 P. 146, 148 (Court of Appeals 1930)	11
Fosburgh v. Sando 166 P. 2d 850, 81	12, 13
Groeneveld v. Camano Bluepoint Oyster Company 81 P. 2d 826, 829	12
Hagan v. Campbell 8 Porters Reports (Ala.) 9, 31 (1838)	11
Holden v. Alexander 82 S.C. 441, 454, 62 S.E. 1108, 1112 (1908)	12
Irwin v. Towne 42 Cal. 326, 334 (1871)	12
Jackson v. Reeves 3 CAI. R. New York, 299 (Supreme Court 1805)	12
Moore v. Harris 2 Ky. Dec. 18 (1801)	12
Simmons Creek Coal Co. v. Doran 152 U.S. 417 at p 432	9, 19

Page

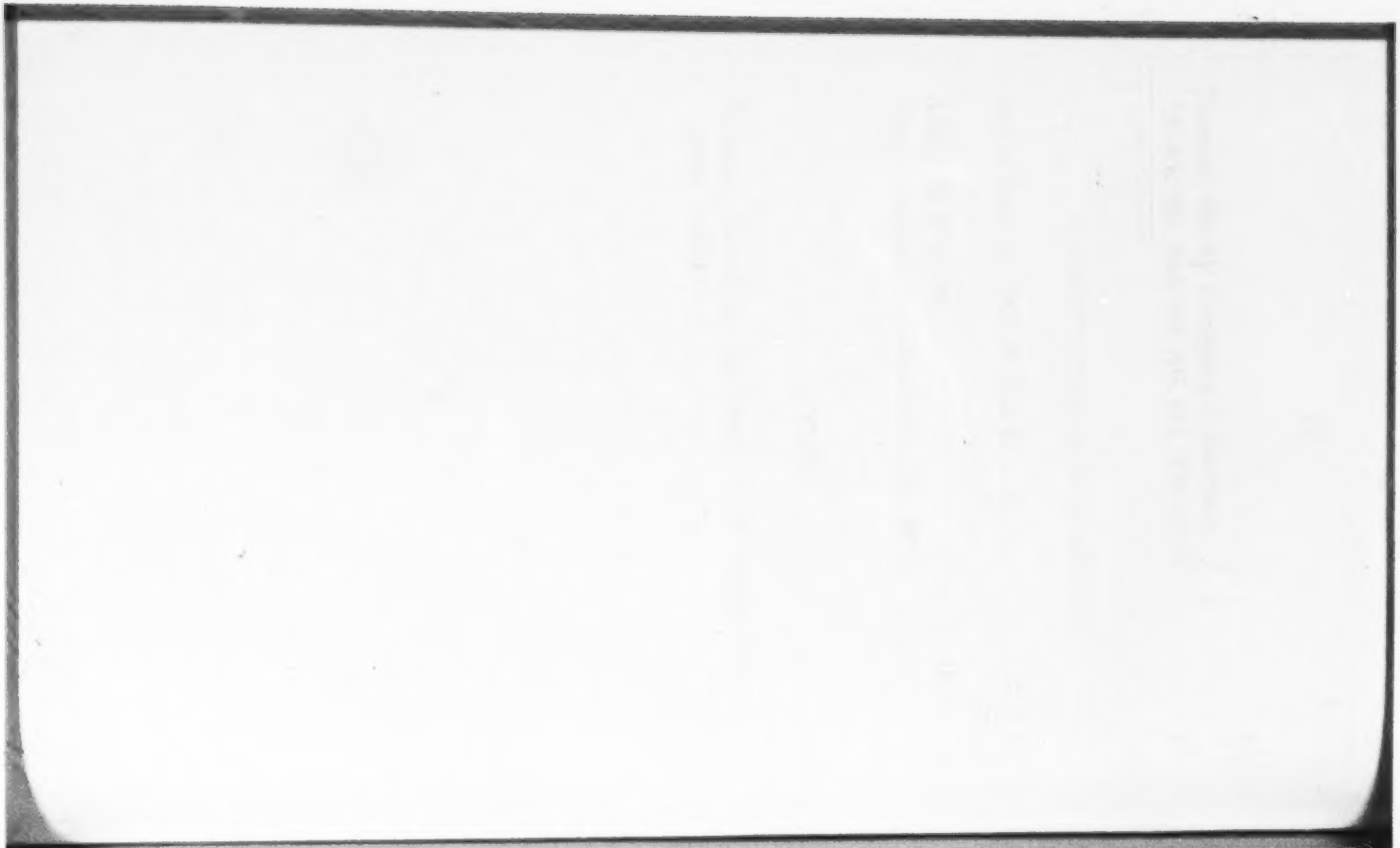
Vermont Marble Company v. Eastman
91 Vt. 425, 443, 101 Atl. 151, 158 (1917) 11

CONSTITUTION AND STATUTES

Act of June 15, 1836, 5 Stat 49 ..... 2, 3, 10, 11, 14
5 Stat 56-57 (1836) 10, 11, 14
Ohio Constitution of November 29, 1802 17

OTHER

Webster, American Dictionary of the English Language (1828) 10, 11



In the Supreme Court of the United States

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BRIEF FOR DEFENDANT IN ANSWER TO EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER TAKEN BY THE PLAINTIFF AND BRIEF IN SUPPORT THEREOF

QUESTIONS PRESENTED

I. Did the Special Master correctly find and conclude that the north cape of Maumee Bay was located in 1836 at the point in that bay where a line drawn north 87° 49' 44" East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn

South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian?

II. Did the Special Master correctly find and conclude that the boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836, on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada?

III. Did the Special Master correctly conclude that the existing seawall on Turtle Island establishes that as a permanent monument on the boundary line between the two states in Lake Erie?

STATEMENT OF THE CASE

The present controversy involves the location of that portion of the boundary line between the States of Ohio and Michigan which runs through the waters of Lake Erie to the eastward of a point which was the location of the most northerly cape of Maumee Bay in 1836. That cape, which has long since eroded to the north, was the eastern terminus of the land boundary between these states. Because of the erosion of the north cape of Maumee Bay the controversy also involves the precise position which that cape occupied in 1836.

The boundary between these states was established by the Congress by the Act of June 15, 1836, 5 Stat. 49,

which provided for the admission of the State of Michigan into the Union. That act provided "That the northern boundary line of the State of Ohio shall be established at, and shall be a direct line drawn from the southern extremity of Lake Michigan, to the most northerly cape of the Maumee (Miami) Bay, after that line, so drawn, shall intersect the eastern boundary line of the State of Indiana; and from the said north cape of the said bay, northeast to the boundary line between the United States and the province of Upper Canada, in Lake Erie; and thence, with the said mentioned line, to its intersection with the western line of the State of Pennsylvania." The people of the State of Michigan, through the vote of a convention of elected delegates on December 15, 1836, assented to the boundary line with the State of Ohio established by the Act of June 15, 1836, an assent which was required by the Act as a condition of admission to the Union. Nonetheless, the two states do not agree upon the meaning and application of the words "from the said north cape of the said bay, northeast" as used in the Act of 1836 to indicate the bearing of the boundary through the waters of Lake Erie eastward of the north cape of Maumee Bay. The State of Michigan contends that "from the said north cape . . . northeast" as used in this Act should be construed to mean in a northeasterly direction, continuing on the same course or bearing as the land portion of the boundary line from the Indiana line to the north cape of Maumee Bay. The State of Ohio, on the other hand, contends that "northeast" as used in the Act of 1836 means due northeast, i.e., North 45° East. The controversy thus involves the question of jurisdiction over a triangular segment of Lake Erie waters and lake bed said to contain about 200 square miles. It also necessarily involves the precise location which was

occupied by the most northerly cape of Maumee Bay in 1836 before it eroded to its present more northerly position.

Within this controversy there is no dispute as to the location of the land boundary, it having been settled since 1915. Both states by a joint commission established and monumented the boundary between them from the westernmost part of the northern boundary of Ohio to the easternmost terminus.

SUMMARY OF ARGUMENT

The North cape of Maumee Bay was located in 1836 at the point in that bay where a line drawn North 87° 49' 44" East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian.

The boundary line between the States of Ohio and Michigan follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836, on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada.

The direction of the boundary line between the states of Ohio and Michigan from the north cape of Maumee Bay to the international boundary line between the United States and Canada can be ascertained from the plain and unambiguous language employed by Congress in 1836 in legislation establishing that line and providing for the admission of Michigan into the Union. Contemporaneous

construction of the direction as North 45° East is indicated by the fact that Captain Williams, the Government Engineer who surveyed the area in 1844, indicated on his map of the area a boundary line between Ohio and Michigan running North 45° East from the north cape of Maumee Bay. It is also suggested by the fact that later maps have likewise indicated the boundary in the lake as running North 45° East.

The north cape of the Maumee Bay can be re-established and ascertained by reversing the course North 45° East through the fixed monument of the seawall on Turtle Island and intersecting that line with the extension of the land boundary line from Post 71 across Maumee Bay. Both Michigan and Ohio, as a result of resolutions passed by their respective legislatures, recognized this theory of boundary demarcation, although Michigan later rescinded their resolution.

ARGUMENT

I. DID THE SPECIAL MASTER CORRECTLY FIND AND CONCLUDE THAT THE NORTH CAPE OF MAUMEE BAY WAS LOCATED IN 1836 AT THE POINT IN THAT BAY WHERE A LINE DRAWN NORTH 87° 49' 44" EAST FROM POST 71 ON THE LAND BOUNDARY LINE BETWEEN THE STATES OF OHIO AND MICHIGAN INTERSECTS A LINE DRAWN SOUTH 45° WEST FROM THE CENTER OF THE EXISTING CIRCULAR CONCRETE SEAWALL ON TURTLE ISLAND, BOTH BEARINGS BEING MEASURED FROM A TRUE MERIDIAN?

The Special Master noted the fact which is agreed upon by all parties, namely, that the north cape of Maumee Bay

which was monumented by Harris in 1817 has eroded a considerable distance to the north since 1836. The problem, therefore, is to establish a point in the bed of Maumee Bay which was the location of the north cape in the year 1836.

The Special Master notes, (Report 31) that the presence of the lighthouse on Turtle Island is very helpful in determining the location of the north cape. The Special Master states, at Report 32, 33, as follows:

> "The Ohio-Michigan land boundary was monumented in 1915 under the auspices of a joint commission, retracing as nearly as possible the Harris Survey. [finding 40]. The land boundary thus monumented as it approaches Post 71, the easternmost monument on the land line, follows a course having the bearing north 87° 49' 44" East. [finding 41]. That same line extended eastwardly from Post 71 across Maumee Bay should pass through the 1836 location of the north cape of Maumee Bay, since that was the original eastern terminus of the land boundary line. A line drawn south 45° West from the presumed location of the former lighthouse in the center of the circular concrete seawall on Turtle Island should also pass through the 1836 location of the north cape of Maumee Bay. Accordingly location of the north cape may be recovered today by determining the point of intersection of these two lines.
>
> It is true that the land boundary as monumented in 1915 may vary slightly from the original Harris line. Likewise, Talcott and Williams vary by 7' 6.4" in their determinations of the bearing of a line drawn

from the former lighthouse on Turtle Island to the north cape of Maumee Bay as it then existed. But these variations, the latter of which may well be the result of minor erosion taking place between 1835 and 1844, are, in my judgment, so small as to be inconsequential in view of the impossibility of determining today the precise points on the north cape which were used by Harris, Talcott and Williams, respectively, in making their surveys. Indeed, the distance between the points on the north cape sighted by Talcott and Williams, respectively I compute at less than 22 feet. I believe it to be of much more significance, from a practical standpoint, that a line drawn from the north cape of Maumee Bay, as it was located by Captain Williams in 1844, on a course having a bearing of North 45° East would pass through the site of the old lighthouse in approximately the center of the seawall on Turtle Island, thus establishing the center of the existing seawall on that island as a permanent monument on the boundary line between the two states in Lake Erie.

This fortunate circumstance will very greatly facilitate not only the demarcation, but also the continous recognition of the location, of that boundary. I am the more persuaded of its appropriateness by the fact that the Legislatures of Ohio and Michigan, in resolutions passed in 1933 and 1945, respectively, declared their boundary in Lake Erie to be a line passing through the center of the circular concrete seawall on the center part of Turtle Island and bearing South 45° West therefrom until it should intersect the land line between the two states as marked

and monumented by them in 1915 [i.e., the former location of the north cape of Maumee Bay]; and that from the aforesaid center of the circular wall the boundary in Lake Erie should extend North 45° East until it intersected the international boundary line between the United States and Canada [findings 42 and 43]. It is true that the resolution by Michigan to this effect in 1945 was a concurrent resolution which, as such, did not have the force of law and that it was rescinded by the Michigan Legislature in 1947. [finding 44]. However, although admittedly not binding on Michigan as a settlement of the present controversy, these resolutions indicate the understanding of both States that if the boundary between them in Lake Erie should be determined to run due northeast, that is, north 45° east, from the former location of the north cape of Maumee Bay, it would pass through the center of Turtle Island. The map of the Erie Quadrangle of the topographical map of the United States published by the United States Geological Survey, with collaboration by the State Highway Commissioner of Michigan [appendix E] to which I have already referred, affords further evidence of such recognition. For it shows the boundary line between the two states in Lake Erie as passing through the center of Turtle Island."

If one adopts the position of the State of Ohio that the line between Michigan and Ohio departs on a course North 45° East from the north cape to the international boundary line, then the most northerly cape of the Maumee Bay can be reestablished and ascertained by taking a point known

to have intersected the line departing from the cape and reversing that course by running a line on the course South 45° West from the known point until the reverse line intersects the projection of the known and established land boundary line. As stated in *Simmons Creek Coal Co. v. Doran*, 152 U.S. 417 at p. 432:

> "It is well settled that in running the line of the survey of public lands in one direction, if a difficulty is met with, and all the known calls of the survey are met by running them in the reverse direction, this may be properly done. *Ayers v. Watson*, 137 U.S. 384."

As stated, Turtle Island is the fixed point from which the determination is made.

II. DID THE SPECIAL MASTER CORRECTLY FIND AND CONCLUDE THAT THE BOUNDARY LINE BETWEEN THE STATES OF OHIO AND MICHIGAN IN LAKE ERIE FOLLOWS A LINE DRAWN FROM THE POINT IN MAUMEE BAY WHERE THE NORTH CAPE OF THAT BAY WAS LOCATED IN 1836, ON A COURSE HAVING A BEARING NORTH 45° EAST MEASURED FROM A TRUE MERIDIAN, PASSING OVER THE CENTER OF THE EXISTING CIRCULAR CONCRETE SEAWALL ON TURTLE ISLAND AND CONTINUING ON THE SAME COURSE THROUGH THE LAKE TO THE POINT WHERE IT INTERSECTS THE BOUNDARY LINE BETWEEN THE UNITED STATES AND CANADA?

It is the position of the State of Ohio that, to ascertain the intention of Congress in 1836 with regard to the direc-

tion of the boundary between Ohio and Michigan from the North cape of the Maumee Bay to the International Boundary Line, it is necessary only to look at the plain meaning of the term "northeast" as used at the time the enabling legislation was enacted. It is helpful to consider initially the actual words utilized by Congress in the Acts in the light of the meaning of those words at the time they were used. In 5 Stat. 49 (1836) Congress first described the land boundary line, which description terminates at the cape, and Congress then recites the next call as "from the said north cape." The preposition "from" is described in the dictionary of the day as follows:

> "The sense of from may be expressed by the noun distance or by the adjective distant, or by the participles, departing, removing into a distance . . ." Webster, American Dictionary of the English language (1828)."

Similarly, in 5 Stat. 56-57 (1836), Congress sets forth the land boundary of the cape, and then the next call recited is "thence, northeast." The word "thence" was defined at the time of its usage as:

> "1. from that place." Webster, American Dictionary of English language (1828)."

It is evident from the foregoing that the call following the one describing the land boundary line is a call departing from said land boundary line at its terminus, the cape.

Buttressing the conclusion of departure, and more importantly, describing the course of the departing line, is the word "northeast," which appears in both of said statutes following the words of departure discussed, *supra*.

Again turning to the plain meaning of this word, "northeast" had but one defined meaning at the time 5 Stat. 49 (1836) and 5 Stat. 56-57 (1836), were passed, to wit:

> "The point between the north and east, at an equal distance from each." Webster, American Dictionary of the English language. (1828).

The use of this word in defining the northern boundary of Ohio not only reaffirms the fact that the Lake boundary line departs from the land boundary line, but gives the course for the lake boundary line which given course is the point an equal distance between north and east, or, in other words, North 45° East. The line contended for by Michigan would merely be an extension of the land boundary line and would run almost due east.

Early and continued judicial interpretation of boundary descriptions containing the course of a line going to a compass position, further substantiates the fact that the call "northeast" in the aforesaid statutes means North 45° East.

There are a plethora of cases interpreting a description employing a call to one of the cardinal points of the compass (north, east, south, west), to mean a line running directly in that course, unless qualified or controlled by other words in a description. See, for example, *Hagan v. Campbell*, 8 Porters Reports (Ala.) 9, 31 (1838); *Vermont Marble Company v. Eastman*, 91 Vt. 425, 443, 101 Atl. 151, 158 (1917); *E. E. McCalla v. Sleeper*, 105 Cal. App. 552, 569, 288 P. 146, 148 (Court of Appeals 1930). Even when the Cardinal point course is qualified by the suffix (ly) or (ward) (ex. northerly, southward), courts have interpreted the course to be a line directly to the cardinal point (ex. due

north, due south) unless controlled by other calls. See, ex. *Jackson v. Reeves*, 3 CAI. R. New York, 299 (Supreme Court 1805); *Brandt v. Ogden*, 1 Johns R. (New York) 156, 158 (S. C. 1806); *Currier v. Nelson*, 96 Cal. 505, 508, 31 P. 531, 532 (1892).

The cases defining the course of a line contained in a boundary description to a compass point other than a cardinal point are in accord with the cardinal point cases (and each other) in holding that a line following such a call must run directly in that course, unless a different location is required by other words in a description. See *Moore v. Harris*, 2 Ky. Dec. 18 (1801); *Irwin v. Towne*, 42 Cal. 326, 334 (1871); *Holden v. Alexander*, 82 S. C. 441, 454, 62 S. E. 1108, 1112 (1908). One of the more succinct statements of this proposition is contained in the case of *Holden v. Alexander, supra,:*

> "While the course 'southwest' called for in the deed without stating degrees is unusual, and possibly might not have been intended to mean an exact course, *yet southwest means a course equally diverging from south and west, or south 45 degrees west;* and when used in a deed, a different meaning cannot be given to it by parole testimony."
>
> (Emphasis Added)

The State of Michigan refers to three cases decided by the Supreme Court of Washington, i.e., *Groeneveld v. Camano Bluepoint Oyster Company*, 81 P. 2d 826, 829; *Fosburgh v. Sando*, 166 P. 2d 850, 851; *Bonded Adjustment Co. v. Edmunds*, 182 P. 2d 17. Michigan concludes that the term "northeast" is similar to "northwesterly" as described

in a statute of the State of Washington and "northerly" in description in conveyances and memoranda of decision in the same state. Michigan further concludes that the Supreme Court of Washington takes the position that the terms "northerly" and "northwesterly" are general terms.

It is submitted that the cases cited by Michigan, *supra*, are inopposite to the present controversy. Even though there does appear language in the cases to the effect that the term "thence northerly" or "thence northwesterly" is a generic term, some of the cases cited were decided on additional grounds. For example, in *Fosburgh v. Sando*, *supra*, at 166 P. 2d 851, the Court states, in part, as follows:

> "... Assuming for the sake of argument, that this course means due north, the next course (thence approximately 207 feet) is not sufficiently definite without recourse to parol evidence, to inform one the direction of the second course."

The case of *Bonded Adjustment Company v. Edmunds*, *supra*, although citing *Groeneveld*, *supra*, regarding the insufficiency of description in a deed, held that a so called written lease of "a house at 2626 W. Fairview" was an insufficient designation of the premises and was invalid under the statute of Frauds.

Neither of the descriptions here in question contain any words or calls, which would qualify or change the course "northeast" to something other than due northeast, North 45° East.

In each of the aforesaid statutes Congress utilized clear and unambiguous language in describing the northern boundary of the State of Ohio in Lake Erie. In both of said statutes Congress described the line in question as a line

departing from the direction of the land boundary line at the most northerly cape of the Maumee (Miami) Bay and beginning at the cape, a course North 45° East, is followed from said cape to the International Boundary Line. The course (northeast) and the distance from the cape to the International Boundary Line are the only descriptions of the Lake Erie portion of Ohio's northern boundary line given in 5 Stat. 49 (1836) and 5 Stat. 56-57 (1836). As was stated by Chief Justice Marshall in *Chinoweth v. Haskell*, 28 U.S. (3 Pet.) 92, 96 (1830):

> "The *courses and distances* are less certain and less permanent guides to the land actually surveyed and granted than natural and fixed objects on the ground, *but they are guides to some extent, and, in the absence of all others, must govern us.*"
>
> (Emphasis Added)

Further substantiating the views expressed above are Ohio Exhibits 1, 2 and 3, the same being the survey of the Maumee Bay under the direction of Captain W. G. Williams in 1844, which survey showed the boundary line between Ohio and Michigan as beginning a course of North 45° East at the point described on the map as "north cape." The boundary line shown on the map following the course North 45° East from "north cape" bisects Turtle Island, and is shown as either passing through the lighthouse on this island or very near to it. The map shows Turtle Island to have a total area of less than an acre. The Williams survey was prepared only eight years after the 1836 enabling legislation.

Additionally, as indicated by the Special Master, the States of Ohio and Michigan both recognized the location

of the north cape of the Maumee Bay and the direction of the boundary line from the north cape to the international boundary line in the resolution of 1933 adopted by the General Assembly of Ohio and the concurrent resolution, identical to Ohio's adopted by the legislature of the State of Michigan in 1945. Even in view of the 1947 Michigan resolution rescinding what that state had done in 1945, it is apparent that both State Legislatures considered that a line following the course North 45° East from the most northerly cape of the Maumee (Miami) Bay passed through Turtle Island, A thorough review of the 1947 Michigan rescission resolution does not indicate that Michigan took issue with this proposition, as is evident by the following language therefrom:

> "Whereas, the State of Ohio, by a concurrent resolution adopted several years ago attempted to resolve the stated uncertainty surrounding the boundary line by adopting a point on Turtle Island on Lake Erie as a basis for a line at 45 degrees to intersect the land boundary line between the states and to intersect the international boundary line *thereby conforming more closely to the language of the original and enabling acts and the constitutional provisions regarding the boundary line between the two states.*"
>
> (Emphasis Added)

The State of Michigan places great reliance upon the Talcott Survey and criticizes the earlier surveys run by Harris and Fulton. It notes that the Talcott survey was transmitted to Congress prior to the enabling legislation of 1836 which admitted Michigan into the Union and de-

fined the boundary line in Lake Erie between the two states. Suffice it to say that Congress had before it, at the time the legislation was adopted, all three surveys in question and there is nothing in the records to indicate that Congress intended an extension of the Talcott line.

Michigan also places great reliance upon the testimony of Professor Berry. Professor Berry's calculations, we contend, cannot have any bearing as to the Congressional intention in 1836. We believe that case law and normal understanding of terms at the time they were used should control their interpretation.

It should be noted that the map relied upon by Congress, and by the convention of Ohio at the time Ohio was admitted into the Union, showed a due east line running so far north that it intersected the Detroit River above Lake Erie. (Michigan Exhibit 7, pages 13, 47).

An interesting analysis of what Congress' acceptance of Ohio's contention as set forth in the Ohio Constitution of 1802, meant to Michigan is set forth at Michigan Exhibit 3, page 78, as follows:

> ". . . It may be proper here to remark again that a reference to the maps of the day will show it was the intention of Congress to give Ohio the whole of the upper part of Lake Erie, it being the only navigable border that state has on its northern limits; whereas if the claim of Ohio be admitted according to her constitution, Michigan will still, besides having nearly all Lake Michigan, part of Lake Superior, all of Lake Huron, and Lake St. Clair, possess a lake border also on Lake Erie of some 5 and 20 miles, with a bay at the mouth of the river raisin, upon

the improvement of which Congress has already bestowed its attention and liberality."

Michigan clearly understood the meaning of the term "thence northeast" contained in the proviso to the Ohio Constitution of November 29, 1802. See Michigan Exhibit 10, pages 4, 6, 30.

There is no evidence that Congress intended to extend the Talcott line, which comes very close to being a due east line. In point of fact, an analysis of Michigan Exhibit 10 reveals that Michigan was well aware of the Lake territory in dispute and what the acceptance of the proviso to the Ohio Constitution of 1802 would mean to it. Michigan knew that it could only come into the Union upon the terms and conditions specified in the Act of 1836. Michigan declined to assent to those terms and conditions in July of 1836 but did assent in December. Michigan Exhibit 10, page 4, the same being a letter to President Andrew Jackson provides, in pertinent part as follows:

> "An accurate survey, recently made by competent engineers, discloses the new and startling fact, that a line from the most northerly cape of the Maumee Bay, northeast to the line to the United States and Canada will not only give to Ohio jurisdiction over the entire western extremity of Lake Erie, even to the mouth of the Detroit River, but will deprive Michigan of jurisdiction over her own acknowledged harbors, even to the depth of four fathom water . . ."

The findings of the Special Master are further supported by Ohio Exhibits 4 and 5. Ohio Exhibit No. 4, in evidence in this case is a map of the "Erie Quadrangle", United States Department of Interior, Geological Survey.

It was published in 1952 and bears the notation at the top of the Michigan State Highway Department, Charles Ziegler, State Highway Commissioner.

Ohio Exhibit Number 5 reflects the "Oregon Quadrangle", United States Department of Interior, Geological Survey, published in 1965.

Both Ohio Exhibits Numbers 4 and 5 portray the Ohio-Michigan boundary in Lake Erie and both clearly show that boundary as extending from Post 71 to the North cape of Maumee Bay and thence North 45° East.

Although Ohio does not now and never has claimed that such exhibits are binding and conclusive upon the issue at hand, it is quite significant and relevant to note that, up until the time of the filing of this law suit, authorities of the State of Michigan seemed to recognize the line in Lake Erie as contended for by Ohio.

III. DID THE SPECIAL MASTER CORRECTLY CONCLUDE THAT THE EXISTING SEAWALL ON TURTLE ISLAND ESTABLISHED THAT AS A PERMANENT MONUMENT ON THE BOUNDARY LINE BETWEEN THE TWO STATES IN LAKE ERIE?

The Special Master correctly concluded that the existing seawall on Turtle Island establishes that as a permanent monument on the boundary line between the two states in Lake Erie.

Many of the references to Turtle Island in evidence in this case have been referred to earlier in this brief. It seems to be the theory of the State of Michigan that the Special Master erred in placing Turtle Island as a monument because it was not referred to specifically in the enabling legislation of 1836. While it is true that Turtle Island was not specifically referred to as a call, it was known by Captain Talcott and by surveyors of the day and represents a

monument which probably has not changed its position since the original legislation referred to. It was also, as has been shown previously, accepted by the state of Michigan in its resolution of 1945 and in further maps since that date which show the boundary line between the two states in Lake Erie as extending North 45° East through the approximate middle of the seawall on that island.

Michigan also challenges the legal principle cited by Ohio of reversing the known call of North 45° East to South 45° West and running the latter course through Turtle Island to relocate the north cape of Maumee Bay. We assert that the principle is perfectly sound and that cases such as *Simmons Creek Coal Company v. Doran* and *Ayers v. Watson, supra*, represent the closest analogous case authority bearing upon the point.

CONCLUSION

In accordance with the Findings and Conclusions of the Special Master we respectfully urge this court to enter a decree in the following form:

It is now ordered, adjudged and decreed as follows:

1. The boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836 on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada.

2. In 1836 the north cape of Maumee Bay was located at the point in that bay where a line drawn North 87° 49'

44" East from Post 71 on the land boundary line between the states of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian.

3. The costs of this suit, including the expenses of the Special Master, shall be born by the State of Michigan.

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief for Defendant in Answer to Exceptions to Report and Recommendations of Special Master taken by the Plaintiff and Brief in Support Thereof" have been mailed to the offices of Frank J. Kelley, Attorney General, State of Michigan, and Robert A. Derengoski, Solicitor General, State of Michigan.

CHARLES S. RAWLINGS
Assistant Attorney General

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 30, Orig.

State of Michigan, Plaintiff,
v.
State of Ohio.
} On Bill of Complaint.

[February 22, 1973]

PER CURIAM and DECREE.

Upon consideration of the Report filed Nov. 9, 1971, by Senior Judge Albert B. Maris, Special Master, exceptions filed thereto, and argument thereon, it is now ordered, adjudged, and decreed as follows:

1. The exceptions filed by the State of Michigan to the report and recommendations of the Special Master are overruled.

2. The boundary line between the States of Ohio and Michigan in Lake Erie follows a line drawn from the point in Maumee Bay where the north cape of that bay was located in 1836 on a course having a bearing North 45° East measured from a true meridian, passing over the center of the existing circular concrete seawall on Turtle Island and continuing on the same course through the lake to the point where it intersects the boundary line between the United States and Canada.

3. In 1836 the north cape of Maumee Bay was located at the point in that bay were a line drawn North 87° 49′ 44″ East from Post 71 on the land boundary line between the States of Ohio and Michigan intersects a line drawn South 45° West from the center of the existing circular concrete seawall on Turtle Island, both bearings being measured from a true meridian.

4. The costs of this suit, including the expenses of the Special Master, shall be borne by the State of Michigan.





INDEX.

	Page
Motion for Leave to File Complaint	1
Statement in Support of Motion for Leave to File Complaint	2
Complaint	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. ..... Original.

STATE OF MISSOURI,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT.

MOTION FOR LEAVE TO FILE COMPLAINT.

The State of Missouri, by Norman H. Anderson, its Attorney General, for the reasons set forth in the accompanying Statement in Support of Motion for Leave to File Complaint, and again more fully set forth in the accompanying Complaint, asks leave of the Court to file its Complaint against the State of Nebraska submitted herewith.

NORMAN H. ANDERSON
Attorney General
State of Missouri
Supreme Court Building
Jefferson City, Missouri.

STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT.

This is an action by the State of Missouri against the State of Nebraska to be, upon leave of Court, instituted as an original action in this Court under authority of Article III, Section 2 of the Constitution of the United States, as it involves a controversy between the State of Missouri and the State of Nebraska.

The establishment of a disputed interstate boundary, the cause of action pleaded in the complaint, is an action historically cognizable in equity and susceptible of judicial enforcement.

The purpose of the proposed action is to establish a claim by the State of Missouri to sovereignty over land on both sides of the Missouri River in Holt and Atchison Counties, Missouri. The original jurisdiction of this Court is invoked because claims of sovereignty to all or parts of the land have been and are presently being made by both the State of Missouri and the State of Nebraska, and complete relief is possible only in this Court.

The complaint, in addition to alleging classical ox-bow situations where, due to flood, the Missouri River (the boundary between Missouri on its western side and Nebraska on its eastern side) has suddenly cut through necks of land and assumed new channels, also alleges divers disputes where the Nebraska claims have no stated basis. Both states have claimed and are claiming sovereignty over parts of the area. Repeated efforts, in good faith, have been made unsuccessfully by the states to resolve this dispute and avoid the present litigation. Only after all such efforts at

settlement have been exhausted are the present motion and complaint filed.

NORMAN H. ANDERSON
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State of Missouri

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Jefferson City, Missouri
Council for Plaintiff.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ..... Original.

STATE OF MISSOURI,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

COMPLAINT.

The State of Missouri, by Norman H. Anderson, its Attorney General, brings this suit against the defendant, the State of Nebraska, and for its cause of action states:

1. The jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States.

2. The northwestern boundary of the State of Missouri was extended to the Missouri River by virtue of the Platte Purchase of 1836. 5 Stat. at Large 34.

3. At the time of its admission to the Union over presidential veto on April 19, 1864, the eastern boundary of Nebraska was established as "... the middle of the channel of said [Missouri] River ..." between the 40th degree of north latitude and the junction of the Niobrara River with the Missouri River.

4. The states of Missouri and Nebraska share a common border in the Missouri River between the southernmost

boundary of Nebraska and the northernmost boundary of Missouri.

5. For the last two decades conflicting claims by parties purporting to own private titles in lands adjacent to the river along this border have been asserted. This court on at least one occasion found it necessary to affirm the divestiture of title of a Missouri resident to lands which the United States District Court for the Western District of Missouri had found to be Missouri lands, because the Missouri resident had made a general entry of appearance in the Nebraska courts and thus conferred jurisdiction upon the Nebraska courts to try the title, Durfee v. Duke, 375 U.S. 106. Other title actions have been brought in the past against holders of Missouri lands such as Otoe County, Nebraska v. Nenneman et al., United States District Court for the District of Nebraska upon apparently unfounded claims for Nebraska taxes against lands on the Missouri side of the river which have been in the undisturbed possession of Missourians from time immemorial. Tax sales and threatened tax sales in Nebraska courts occur with regularity against lands on the Missouri side of the river which are and have been in the undisturbed possession of Missourians for generations and no foundation or explanation for said sales have been forthcoming.

6. The State of Missouri by authorization of its legislature and by the efforts of its Governor and attorney General have sought to ascertain the nature of the claims made against its lands by the State of Nebraska but no explanation has been offered.

7. The State of Missouri has further attempted to establish a compact agreement with the State of Nebraska with respect to the common boundary, also to no avail.

WHEREFORE, Plaintiff prays:

A. That this court exercise its jurisdiction and declare sovereignty in the State of Missouri over those lands bordering the State of Nebraska which rightfully belong to the State of Missouri.

B. And for such other and further relief as to the Court seems meet and appropriate in the premises.

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Counsel for Plaintiff.

HOWARD L. McFADDEN
Assistant Attorney General
Of Counsel.

JUL 22 1967

JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1966

No. 32 Original

STATE OF MISSOURI, PLAINTIFF

V.

STATE OF NEBRASKA, DEFENDANT

BRIEF OF DEFENDANT, STATE OF NEBRASKA, IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT OF STATE OF MISSOURI

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INDEX

Page

Grounds of Opposition 1
Argument 2
Alternative Request 7
Conclusion 13
Appendix "A" 15
Proof of Service 21

CITATIONS

CASES:

Alabama v. Arizona, 291 U. S. 286 2
Arkansas v. Texas, 346 U. S. 368 13
Durfee v. Duke, 375 U. S. 106 5
Hinderlider v. La Plata Co., 304 U. S. 92 9
Massachusetts v. Missouri, 308 U. S. 1 5
Minnesota v. Wisconsin, 252 U. S. 273 10
Missouri v. Nebraska, 196 U.S. 23 9
Nebraska v. Wyoming, 325 U. S. 589 11
New York v. Illinois, 274 U. S. 488 6
New York v. New Jersey, 256 U. S. 296 10
Oklahoma v. Gulf, Col. & Santa Fe Ry. Co., 220 U. S. 290 5
Washington v. Oregon, 214 U. S. 205 11

CONSTITUTION:

Article I, Section 10 of the Constitution of the United States 9

In The

Supreme Court of the United States

October Term, 1966

No. 32 Original

STATE OF MISSOURI, PLAINTIFF

V.

STATE OF NEBRASKA, DEFENDANT

BRIEF OF DEFENDANT, STATE OF NEBRASKA, IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT OF STATE OF MISSOURI

GROUNDS OF OPPOSITION

The defendant, State of Nebraska, respectfully submits that the Motion for Leave to File Complaint by the State of Missouri should be denied because the Complaint exhibited therewith fails in each of the following respects:

(1) It is insufficient to apprise the Court and the defendant of the issues involved.

(2) It does not state a justiciable controversy.

(3) It does not ask for relief which can be granted in the form requested.

(4) It seeks an opinion of the Court which is advisory in nature.

In The

Supreme Court of the United States

October Term, 1966

No. 32 Original

STATE OF MISSOURI, PLAINTIFF

V.

STATE OF NEBRASKA, DEFENDANT

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(3) It does not ask for relief which can be granted in the form requested.

(4) It seeks an opinion of the Court which is advisory in nature.

(5) It does not show a case of absolute necessity.

(6) It does not allege facts that are clearly sufficient to call for a decree in favor of the plaintiff.

(7) No threatened injury is alleged of serious magnitude and imminent.

Alternatively, if the Motion is not denied, the defendant respectfully submits that the Court should postpone the taking of jurisdiction of the Complaint until the possibilities of settlement by boundary compact have been fully explored by the States and that remedy has been exhausted.

ARGUMENT

This Court has established certain basic principles against which the Complaint exhibited by the plaintiff, State of Missouri, should be examined. The following language from *Alabama* v. *Arizona*, 291 U. S. 286, 291-292, is applicable to this Complaint:

> "This court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States*, 219 U. S. 346. *Willing* v. *Chicago Auditorium Assn.*, 277 U. S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 261-262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana* v. *Texas*, 176 U. S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against

another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois*, 200 U. S. 496, 520-521. *New York* v. *New Jersey*, 256 U. S. 296, 309. *North Dakota* v. *Minnesota*, 263 U. S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri* v. *Illinois*, *supra*, 521. In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. Cf. *Ex parte La Prade*, 289 U. S. 444, 458. The burden upon the plaintiff State fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669."

Although the Statement in Support of Motion seems to suggest that this is merely an action to establish a disputed interstate boundary which "is an action historically cognizable in equity and susceptible of judicial enforcement", the actual allegations of the Complaint should be examined in light of the above principles and it is submitted that the Complaint fails to meet the requisite standards.

The burden is upon the State asking leave to sue another to allege facts that are clearly sufficient to call for a decree in its favor. An examination of the facts alleged shows the Complaint to be seriously deficient in this regard.

Paragraph 4 of the Complaint states that Missouri and Nebraska share a common border in the Missouri River. Paragraph 5 alleges that there have been conflicting claims by parties purporting to own private

titles in lands adjacent to the river but fails to identify by description any of these lands. The length of the Missouri River between Nebraska and the State of Missouri is approximately 62 miles and, if this is a controversy as to boundary, defendant and this Court are entitled to a description of the specific areas which are in dispute and the factual basis for Missouri's claims to each parcel of land, together with a statement of the facts constituting conduct by the State of Nebraska with regard to each of those areas.

Although the Statement in Support of Motion for Leave to File Bill of Complaint states that the Complaint alleges "classical ox-bow situations where, due to flood, the Missouri River • • • has suddenly cut through necks of land and assumed new channels", there are no such references in the Complaint and it otherwise fails to state the interest of the State of Missouri in the situations described in Paragraph 5 of the Complaint.

Paragraph 5 mentions two court actions, one between private individuals, and another concerning title actions based upon "apparently unfounded claims for Nebraska taxes against lands on the Missouri side of the river which have been in the undisturbed possession of Missourians from time immemorial"; and it alleges the occurrence of tax sales and threatened tax sales in Nebraska courts against lands "on the Missouri side of the river which are and have been in the undisturbed possession of Missourians for generations and no foundation or explanation for said sales have been forthcoming." The fact that lands may have been in the undisturbed possession of Missourians does not constitute an allegation that the lands are within the

State of Missouri or proper subject of complaint on behalf of the State. The case of *Durfee* v. *Duke*, 375 U. S. 106, has been decided by this Court and should not now be the subject of further complaint without further explanation by the pleader. The interest of the private property claimants was determined in that case and if the State of Missouri is in reality bringing this action for the benefit of any individuals involved in that suit, jurisdiction should be refused as it is well established by the decisions that this Court will not entertain a proceeding on original jurisdiction by a State on behalf of its citizens or group of citizens and not in the interest of the State itself. *Massachusetts* v. *Missouri*, 308 U. S. 1; *Arkansas* v. *Texas*, 346 U. S. 368; *Oklahoma* v. *Gulf, Col. & Santa Fe Ry. Co.*, 220 U. S. 290.

The case of *Otoe County, Nebraska* v. *Nenneman* is not described with sufficient particularity to apprise the Court or the defendant of the alleged wrong. Similarly, the reference to tax sales and threatened tax sales stops short of allegation of injury to the State or its citizens. Allegations of conflicting claims to lands by parties are made but no allegation is made that the land is also taxed or claimed by Missouri or what the claims of Missouri are founded upon. Although Paragraph 6 of the Complaint alleges that the State of Missouri has sought to ascertain the nature of the claims made against its lands by the State of Nebraska but no explanation has been offered, the State of Missouri certainly should know what the facts are concerning the conduct of the State of Nebraska with regard to the specific areas.

The Complaint not only fails to show a threatened injury of serious magnitude and imminence but wholly

fails to state what the threatened injury to the State of Missouri might be.

There is no showing in the Complaint or Statement in Support thereof that a case of absolute necessity exists nor are there facts alleged that are clearly sufficient to call for a decree in favor of Missouri.

While the Complaint does not reveal specifically that it seeks an advisory opinion, the Complaint, particularly the prayer for relief, is so general in terms as to invoke the complete spectrum of judicial pronouncement. The prayer asks only that the "court exercise its jurisdiction and declare sovereignty in the State of Missouri over those lands bordering the State of Missouri which rightfully belong to the State of Missouri." It would seem the Court could make such a declaration without further proceedings and the result would be neither a determination of any rights nor the establishment of any principles for a future course of conduct.

The Complaint exhibited with the Motion for Leave to File presents only abstract questions concerning unspecified acts or threats of harm to Missouri or her citizens. This language from *New York* v. *Illinois*, 274 U. S. 488, 489-490, is appropriate to this situation:

> "* * * The bill, in its third paragraph, attempts to set up another injury from the diversion. This paragraph has not been answered, but is assailed by a motion to strike it out. The Court has heard oral argument on the motion and will now rule on it.
>
> "The third paragraph of the bill apparently proceeds on the theory that the diversion may interfere with or prevent the use of the waters of the

Niagara and St. Lawrence Rivers by the plaintiff State and her citizens for the development of power. But it does not show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected. The waters are international and their use for developing power may require the assent of the Dominion of Canada and the United States. No consent of either is shown. The suit is one for an injunction, a form of relief which must rest on an actual or presently threatened interference with the rights of another. Plainly no basis for such relief is disclosed in what is said about water power development. At best, the paragraph does no more than present abstract questions respecting the right of the plaintiff State and her citizens to use the waters for such purposes in the indefinite future. We are not at liberty to consider abstract questions. New Jersey v. Sargent, 269 U. S. 328. So the motion to strike out the paragraph must be sustained. * * *"

No responsive pleading can traverse the allegations of the proposed Complaint, and this being so, the Complaint is so defective as to require denial of leave to file.

ALTERNATIVE REQUEST

Alternatively, if the Motion for Leave to File Complaint is not denied, the defendant respectfully submits that the Court should postpone the taking of jurisdiction of the Complaint until the possibilities of settlement by boundary compact have been fully explored by the States and that remedy has been exhausted.

The plaintiff has alleged in Paragraph 7 of the Complaint that it has "* * * further attempted to establish

a compact agreement with the State of Nebraska with respect to the common boundary, also to no avail." Plaintiff has also stated in its Statement in Support of Motion for Leave to File Complaint, "Repeated efforts, in good faith, have been made unsuccessfully by the States to resolve this dispute and avoid the present litigation. Only after all such efforts at settlement have been exhausted are the present Motion and Complaint filed."

The Affidavit of the Attorney General of Nebraska attached hereto and marked Appendix "A" refutes those statements. The fact is that officials of the two States had reached a general agreement concerning how to proceed and have been engaged in meaningful discussion in an attempt to settle the boundary problems. It was the defendant's understanding that the office of the Attorney General of Missouri was to make an initial draft of a proposed compact and submit it to the Nebraska Attorney General as a starting point towards the solution of the problems which the States might have. In addition, the States were attempting to identify those areas along the river which may be in dispute but this has not yet been completed.

If plaintiff is asking this Court to determine the entire boundary between Nebraska and Missouri and to establish claims by the State of Missouri to sovereignty over lands on both sides of the Missouri River, this could be an extremely lengthy and unwieldy task. Considering that the Missouri River flows for approximately 62 miles along Nebraska's eastern boundary from the southern boundary of Iowa to the northern boundary of Kansas and that there are also approximately 9 miles of established dry land boundary be-

tween Missouri and Nebraska around McKissick's Island, as determined by this Court in the case of *Missouri* v. *Nebraska*, 196 U. S. 23, and further taking into account the fact that the Complaint has not identified any specific areas along that approximately 62 miles of river, this case would appear to be a particularly appropriate one for the Court to hold in abeyance until the possible remedy by agreement has been completely explored. Appendix "A" states that the Nebraska Attorney General, Governor and State Surveyor are ready, willing and able to have further discussions and that there is no reason to believe that such discussions cannot lead to a satisfactory solution of the boundary problems. If the States might be able to settle their difficulties so as to obviate the necessity of a determination by this Court of the boundary location in every individual instance, such course should be pursued.

This Court has often recognized that a judicial solution is somewhat awkward and unsatisfactory and has sometimes deemed it appropriate to emphasize the practical constitutional alternative provided in the compact clause of Article I, Section 10 of the Constitution of the United States. In *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 105-106, Mr. Justice Brandeis commented as follows:

> "* * * But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court sug-

> gested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' *Washington* v. *Oregon*, 214 U. S. 205, 217, 218; *Minnesota* v. *Wisconsin*, 252 U. S. 273, 283. In *New York* v. *New Jersey*, 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

In *New York* v. *New Jersey*, 256 U. S. 296, 313, the Court took jurisdiction in a case involving a suit by the State of New York to enjoin the State of New Jersey and its sewerage commissioners from discharging a large volume of sewage into the waters of Upper New York Bay. However, the Court dismissed the action without prejudice, concluding that the complainants had failed to show by the convincing evidence which the law requires that the sewage would so corrupt the waters of the bay as to create a public nuisance. The Court further observed:

> "We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

Minnesota v. *Wisconsin*, 252 U. S. 273, 283, was an original action brought by Minnesota to establish the boundary line between Wisconsin and Minnesota in Upper and Lower St. Louis bays. The Court again de-

cided the case on the merits but concluded its opinion with the following observation:

> "It seems appropriate to repeat the suggestion made in *Washington* v. *Oregon, supra,* (214 U. S. 205) 217, 218, that the parties endeavor with consent of Congress to adjust their boundaries."

In *Washington* v. *Oregon,* 214 U. S. 205, 217, 218, another boundary case, the Court, in closing, quoted a joint resolution of Congress to enable the States of Mississippi and Arkansas to agree upon a boundary line and then said:

> "Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction."

In *Nebraska* v. *Wyoming,* 325 U. S. 589, 616, a case involving the apportionment of waters of an interstate stream, the Court in its opinion on the merits, stated:

> "* * * We noted in *Colorado* v. *Kansas, supra,* (320 U. S.) p. 392, that these controversies between States over the waters of interstate streams 'involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences

> of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.' But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution. * * *"

In all of the aforementioned cases, the Court did take jurisdiction but recognized that the type of problem involved should be settled by agreement if possible. The Complaint filed by Missouri does not identify any specific areas which may be claimed by the State of Nebraska and also claimed by the State of Missouri, nor are allegations made concerning the proper location of the boundary. The parties, through their negotiations, were in the process of attempting to identify such areas and determine whether agreement could be made concerning jurisdiction over these areas. They should be encouraged to continue this investigation and exploration of possibilities of amicable settlement. Should this fail, there is ample opportunity for resort to this Court.

Although we have cited no cases in which this Court has postponed taking jurisdiction on the grounds stated, there is precedent for such delay in other situations. This Court has postponed the taking of jurisdiction in an original action between States pending the determination of an action in a state court which might solve such dispute or provide a meaningful decision which would aid this Court in its determination.

In *Arkansas* v. *Texas*, 346 U. S. 368, the State of Arkansas filed a Motion for Leave to File Complaint charging that the State of Texas had illegally interfered with a contract between the University of Arkansas and a Texas charitable corporation. The Court indicated that the central question which the case tendered was whether the foundation had authority to spend its funds for furtherance of the Arkansas project and this was necessarily a question of Texas law because the foundation obtained its existence and its powers from Texas. Litigation was then pending in the Texas courts which would authoritatively determine what the Texas law was and the Supreme Court therefore continued the Motion until the litigation in the Texas courts had been concluded.

The State of Nebraska suggests that the two States should be given further opportunity to adjust their boundary problems prior to the taking of jurisdiction by this Court. Missouri has not alleged any injury to it by past failure to reach agreement and does not allege any imminent damage or injury pending future determination. If it can be inferred from Missouri's allegations that they are still interested in pursuing negotiations, Nebraska officials would welcome further discussions and will participate in good faith in accordance with the Affidavit attached hereto as Appendix "A".

CONCLUSION

The State of Nebraska respectfully contends that the Motion for Leave to File Complaint should be denied. In the alternative, the State of Nebraska respectfully submits that this Court should postpone the taking of

jurisdiction until the possibilities of settlement between the States have been exhausted.

Respectfully submitted,

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APPENDIX "A"

In The

Supreme Court of the United States

October Term, 1966

No. 32 Original

STATE OF MISSOURI, PLAINTIFF

V.

STATE OF NEBRASKA, DEFENDANT

AFFIDAVIT

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

CLARENCE A. H. MEYER, being first duly sworn, on oath deposes and says:

He is, and has been since January 5, 1961, the Attorney General of the State of Nebraska.

On December 31, 1961, he and Governor Frank B. Morrison, then Governor of the State of Nebraska, met in Kansas City, Missouri, with Governor John M. Dalton, then Governor of Missouri, and Attorney General Thomas F. Eagleton, then Attorney General of Missouri, and discussed the mutual problems between the two states along their Missouri River boundary.

At that time, the parties agreed that, after surveys were completed and disputed areas pinpointed, there would be a further meeting between the parties at which time a determination would be made as to whether the problem could best be resolved through a boundary commission or whether it would be best to proceed by means of a friendly action in the Supreme Court of the United States.

During the 72nd session of the Nebraska Legislature (1961), Legislative Resolution 38 was adopted requesting the Board of Educational Lands and Funds and the State Surveyor to make a survey of the boundary of the State where the same was formed by the Missouri River, to obtain and file in its offices its maps, charts, surveys, records and other documents and materials as may be essential or helpful in determining the boundary or titles to lands along the river. Pursuant to the authority vested by the Board of Educational Lands and Funds and the aforementioned Legislative Resolution 38, Willis L. Brown, the State Surveyor, embarked on the task of making surveys of the boundary of the State along the Missouri River including those places where the State is contiguous to the States of South Dakota, Iowa and Missouri. A great deal of time and effort has been spent by the State Surveyor's Office in the investigation, compilation and collection of this data, much of which has pertained to border areas of South Dakota and Iowa, but a considerable amount of which has pertained to the Missouri border.

Some time prior to February 25, 1964, Mr. Willis Brown, Nebraska State Surveyor, met with a Mr. Riddle, a surveyor employed by the State of Missouri in connection with the boundary, concerning the boundary

problem. On or about February 26, 1964, Mr. Brown received a letter from Missouri Governor Dalton's legal assistant stating, among other things, that:

> "Mr. Riddle has resigned as the State Surveyor for Missouri in connection with the boundary line between Missouri and Nebraska. A new Surveyor for Missouri for this project has been appointed. He is Mr. E. I. Myers, Law Building, 1207 Grand Avenue, Kansas City, Missouri, telephone No. BA1-1512."

Mr. Brown and Mr. Howard H. Moldenhauer, Special Assistant Attorney General of Nebraska, met with Mr. Myers and Mr. Howard McFadden, an Assistant Attorney General of Missouri, in Mr. Myers' office at Kansas City, Missouri, on Tuesday, March 3, 1964, to consider the boundary. At that time, the parties discussed a program of meetings or hearings at various places along the Missouri River at which time property owners and others who would be affected by a Compact could attend and state their problems. One such meeting was held in Mound City, Missouri, on March 16, 1964, at which Mr. Willis Brown and Mr. E. I. Myers were in attendance.

A meeting was arranged by Governor Dalton and Governor Morrison which was held in Lincoln, Nebraska on August 31, 1964. Present at this meeting from the State of Missouri were Mr. E. I. Myers, Surveyor, Mr. Howard McFadden, Assistant Attorney General, Mr. John Inglish, Attorney-at-Law, and Mr. Wayne W. Waldo, Legal Assistant to Governor Dalton. Present for the State of Nebraska were Mr. Willis Brown, State Surveyor, and Mr. Howard H. Moldenhauer, Special Assistant Attorney General of Nebraska. The purpose of this meeting was to lay the groundwork for

action by Nebraska's 11-member boundary commission at a future date. As a result of this meeting, Mr. Howard McFadden, Assistant Attorney General of Missouri, was to prepare an initial draft of a proposed Compact between the two states to settle their boundary problems.

It was decided at the meeting that an initial rough draft of a Boundary Compact would be prepared by Mr. McFadden, the Assistant Attorney General of Missouri, with the hope that, when the boundary commission or appropriate Nebraska body met to discuss the situation, they would have before them something to work with. Mr. Moldenhauer was to write Mr. McFadden a letter outlining some of the problems which had been encountered as a result of the experience with Iowa or with suggestions to eliminate some of these problems. Pursuant to this understanding, Mr. Moldenhauer prepared and sent a letter to Mr. McFadden dated September 11, 1964, stating the types of problems which should be anticipated in the preparation of a preliminary draft of a possible boundary compact between Missouri and Nebraska. The letter concluded with the following sentence: "We shall look forward to your initial draft."

Mr. Moldenhauer and the Nebraska Attorney General's Office have never received any response to that letter or any draft of a proposed compact, and this office was awaiting such a draft up until the filing of the complaint by the State of Missouri in this case.

On or about March 23, 1965, Mr. Moldenhauer received a telephone call from a Representative Cox, a member of the Missouri Legislature, who told Mr.

Moldenhauer he wanted to inform Nebraska officials that he was introducing a proposed bill which would constitute a boundary compact between the States of Missouri and Nebraska and he wanted to explain that this was being done in order to meet a deadline which existed concerning the introduction of new legislation in Missouri. Representative Cox explained that, should Nebraska officials hear of the proposed bill, they should not take it to mean that Missouri was proceeding unilaterally or without further consultation with Nebraska. Representative Cox further indicated that there was to be a meeting the following day of State officials in Jefferson City concerning this matter and he hoped that they would be in further contact with Nebraska officials to work on the problem. Neither Mr. Moldenhauer nor the Nebraska Attorney General's Office received any further messages from the State of Missouri concerning a proposed boundary compact, prior to notice that the Complaint in this case was being filed.

Mr. Willis Brown, Nebraska State Surveyor, has also furnished maps to Mr. Myers, and Mr. Brown and Mr. Myers have had miscellaneous other discussions, meetings or telephone conversations concerning the boundary problems. In none of these conferences was it ever indicated that the States were at an impasse or that negotiations had reached a stage where agreement could not be reached.

Affiant, as Attorney General, at no time prior to the notice of filing of this Complaint by the State of Missouri, considered that efforts at settlement of the boundary problems had been exhausted, but as previously stated, affiant was awaiting a draft of a proposed com-

pact from the Attorney General's Office of the State of Missouri.

The Nebraska Attorney General, Governor of Nebraska and State Surveyor, stand ready, willing and able to meet with, or have their representatives meet with, representatives of the Missouri Attorney General's Office or the Missouri Governor's Office to resume the discussions concerning the boundary in accordance with the oral agreement of December 31, 1961. Affiant has no reason at this time to believe that such discussions, from Nebraska's standpoint, cannot reach a satisfactory solution to the boundary problems between Nebraska and Missouri.

_____

Clarence A. H. Meyer

Subscribed and sworn to before me this ..... day of July, 1967.

_____

Notary Public

PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July ....., 1967, I served a copy of the foregoing BRIEF OF DEFENDANT, STATE OF NEBRASKA, IN OPPOSTION TO MOTION FOR LEAVE TO FILE COMPLAINT OF STATE OF MISSOURI by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

Honorable Warren E. Hearnes
Governor of the State of Missouri
State Capitol
Jefferson City, Missouri

Honorable Norman H. Anderson
Attorney General,
State of Missouri
Supreme Court Building
Jefferson City, Missouri

Brick P. Storts, III
Assistant Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri

Howard L. McFadden
Assistant Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri

such being their post office addresses.

Clarence A. H. Meyer
Attorney General,
State of Nebraska
State Capitol Building
Lincoln, Nebraska 68509

FILED

NOV 2 1957

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1957.

No. 16 Original.

STATE OF MISSOURI,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT AND AMENDMENT TO COMPLAINT.

NORMAN H. ANDERSON
Attorney General

HOWARD L. McALLISTER
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Plaintiff,
State of Missouri



INDEX.

Page

Plaintiff's Response to Defendant's Brief in Opposition to Motion for Leave to File Complaint and Amendment to Complaint 1

Conclusion 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1967.

No. 32 Original.

STATE OF MISSOURI,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT AND AMENDMENT TO COMPLAINT.

The State of Missouri seeks leave to file an original action against the State of Nebraska concerning the location of their common boundary.

Nebraska in its brief in opposition, asks that the court deny leave upon the grounds taken up and disposed of herein below.

I.

The complaint states an action cognizable in this court.

The first four reasons given by the State of Nebraska for denying relief herein, though couched in vague generalities, seem to express a brief that no controversy is pleaded.

This simply is not true. The complaint clearly alleges that the Missouri River is the Boundary between the states and that various Nebraska governmental units and courts are declaring that certain Missouri lands adjacent to the river belong to Nebraska.

It is manifest that the State of Nebraska admits the jurisdiction of this court and only argues against the exercise of that jurisdiction.

Admittedly, as stated by Nebraska, apparently as the mainthrust of its argument against the court's exercise of its jurisdiction, this Court encourages adjustment—i.e., interstate legislative compacts—between boundary disputing states. However, as stated in Hinderlider v. LaPlate Co., 304 U.S. 92, there are "... two means provided by the Constitution for adjusting interstate controversies." In addition to detailing and expressing satisfaction with the legislative compact method the Court is clear in observing that resort to the Court is essential where the states "... are unable to agree upon the terms of a compact, or Congress refuses its consent." (Hinderlider, 304 U.S. at p. 105.)

Although attempts at settlement and failure to agree are not essential prerequisites to instituting such interstate legal action, in keeping with the wishes of this Court and good common sense, in point of fact such attempts have been made and are alluded to in the complaint and statement in support of the motion for leave to file the complaint.

There was, as alleged by Nebraska, a meeting between the former Governors of the two states, the former Attorney General of Missouri, the present Attorney General of Nebraska and their advisors. The meeting was held in 1961

for the purpose of trying to work out some means of persuading the local Nebraska people to refrain from continuing their attempts to seize Missouri lands (there being no corresponding adverse Missouri claims) and it was agreed that the Nebraska officials would exert such local influence as they possessed in that connection but the adverse claims have not been relinquished for the obvious reason that the Nebraska State executive officials do not control the local governmental officials and courts.

Furthermore, both states have enacted compact legislation with respect to the border but the Nebraska compact statute was repealed before the proposition could be submitted to Congress.

The three remaining reasons advanced for denying relief herein apparently go to the sufficiency of the complaint to spell out specific parcels of land in dispute, their value and the cause of dispute.

As to the cause of dispute we can only speculate because we believe the lands in question belong to Missouri and no Nebraska official has ever given an explanation for Nebraska's claim to the lands. Regardless, this is a matter which can be best determined when a Special Master is appointed.

This is also true of the value involved. The matter of identifying the lands is taken up under the next heading.

II.

AMENDMENT TO COMPLAINT.

The lands known to be in dispute by the officials of the State of Missouri at the time of filing this amendment are as follows:

1. Property subject of a suit between private individuals (Durfee v. Duke, 1963, 375 U.S. 106). This land was accreted to the left bank (Missouri side) of the Missouri River and

consists of fractional portions of Sections 8, 9, and 10, Range 40 west of the Fifth Principle Meridian, Township 60, north of the Base Line. It lies south of the slough line and left of the main channel of the Missouri River as shown on Sheet No. 54, Missouri River, Rulo, Nebraska to Yankton, South Dakota, Series on file at the United States Engineers' Office, Omaha, Nebraska.

2. Lands owned by Peter Blohm previously accreted to the right bank of the Missouri River but severed from the right bank by an engineering realignment. This land consists of the fractional north half of the northeast fourth of Section 3, Range 40, west of the Fifth Principle Meridian, Township 61, north of the Base Line. The fractional south half of Section 3, Range 40 west of the Fifth Principle Meridian, Township 61, north of the Base Line. The fractional northeast fourth of Section 10, Range 40 west of the Fifth Principle Meridian, Township 61, north of the Base Line. These lands now lie to the right of the center of the existing main channel of the Missouri River and fall between the center line of the main channel as it existed in 1936 and the center line of the main channel after realignment at the point in question as indicated by comparing Corps of Engineers' Map Sheets No. 43R, October 28, 1936, revised to April 1, 1937 and No. 43R, August 29, 1938, revised to August 3, 1939.

These lands have been entered and are being cultivated by individuals who pay taxes thereon in Nebraska.

3. Lands belonging to Glenn Haer, beginning at a point on the west prolongation of the north line of the east half of the northwest fourth of Section 8, which is 6120 feet more or less west of the north fourth corner of said Section 8.

Thence southeasterly along the center line of a well defined slough to a point on the west prolongation of the East/

West Center Line of said Section 8 which is 4360 feet more or less west of the center of said Section 8.

Thence east along the west prolongation of the East/West Center Line of Section 8 a distance of 3700 feet more or less to a point on the right bank of the existing Missouri River Channel.

Thence northwesterly following the right high bank of the Missouri River Channel as now existing 3180 feet more or less to a point on the north line of the west half northwest fourth of Section 8 which is 2200 feet more or less west of the north fourth corner said Section 8.

Thence west along the west prolongation of the north line of the northwest fourth Section 8 a distance of 3920 feet more or less to the place of beginning containing 189 acres more or less. This land, formerly attached to the Missouri high bank has been isolated to the right of the main channel of the Missouri River by work of the Corps of Engineers and has subsequently been sold under Nebraska tax sales.

4. The property of Alex and Arthur Vogel, lands accreted to the Missouri high bank but subject of Otoe County, Nebraska tax actions and sales. These are fractional portions of Sections 10, 15, and 22, Range 43 west of the Fifth Principle Meridian, Township 66, north of the Base Line containing 605.57 acres.

5. The property of E. B. Nennemann, approximately 433.57 acres located in the southeast fourth of the northwest fourth of Section 13 and the northeast fourth of the southwest fourth of Section 13, Range 43, west of the Fifth Principle Meridian, Township 66, north of the Base Line.

This property has been subject of a Nebraska tax suit.

6. The property of Gene Fender, subject to a Nebraska tax suit, but being Missouri accretion ground, consisting of

549.19 acres, the fractional west fourth of Section 12, Range 43, west of the Fifth Principle Meridian, Township 66, north of the Base Line. The same being accretions to lots 1, 2, and 3 of the fractional northeast fourth of Section 12, Range 43, west of the Fifth Principle Meridian, Township 66, north of the Base Line.

7. The property of Raymond Hodde, Missouri accretion land, subject to Nebraska tax sales, and located in Sections 2 and 11, Range 43, west of the Fifth Meridian, Township 66, north of the Base Line.

8. The property of Alma Winkler, consisting of 167.6 acres of Missouri accretion land subject of a Nebraska tax suit described as part of the southern half of the northwest fourth of Section 14 of the north part of the southwest fourth of Section 14, Range 43, west of the Fifth Principle Meridian, Township 66, north of the Base Line.

CONCLUSION.

An action cognizable in this court having been stated with particularity, the defendant should be required to answer.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General

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Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Plaintiff,
State of Missouri.

549.19 acres, the fractional west fourth of Section 32, Range 43, west of the Fifth Principle Meridian, Township 66, north of the Base Line. The same being accretion to tracts 2 and 3 of the fractional northeast fourth of Section 12, Range 43, west of the Fifth Principle Meridian, Township 66, north of the Base Line.

7. The property of Raymond Heide, Missouri accretion land, subject to Nebraska tax sale, and located in Section 11, Range 43, west of the Fifth Meridian, Township 66, north of the Base Line.

8. The property of Alice Winkler, consisting of [illegible] acres of Missouri accretion land subject of a Nebraska tax sale, said described as part of the southern half of the northeast fourth of Section 14 of the north part of the northwest fourth of Section 14, Range 43, west of the Fifth Principle Meridian, Township 66, north of the Base Line.

CONCLUSION.

An action cognizable in this court having been stated with sufficient particularity, the defendant should be required to answer.

Respectfully submitted,

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Attorneys for Plaintiff,
State of Missouri.

MAR 7 1968
JOHN F. DAVIS, CLE

In The

Supreme Court of the United States

October Term, 1968

No. 32 Original

STATE OF MISSOURI, PLAINTIFF,

V.

STATE OF NEBRASKA, DEFENDANT.

ANSWER

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In The

Supreme Court of the United States

October Term, 1966

No. 32 Original

STATE OF MISSOURI, PLAINTIFF,

V.

STATE OF NEBRASKA, DEFENDANT.

ANSWER

The State of Nebraska for answer to the complaint and amendment thereto alleges:

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The complaint seeks a determination by the Court of the location of the boundary between Missouri and Nebraska without alleging plaintiff's claim as to the location of such boundary, and therefore the complaint is insufficient to state a claim upon which relief can be granted.

THIRD DEFENSE

The complaint fails to state a controversy between the parties and seeks an opinion which is advisory in nature.

FOURTH DEFENSE

The complaint fails to state the nature of plaintiff's interest in the proceedings which gives it standing before the Court as a proper party plaintiff.

FIFTH DEFENSE

Defendant admits paragraphs 1 and 2 of the complaint.

I.

Paragraph 3 is denied. Nebraska was admitted to the Union by Act of Congress approved February 9, 1867 and by Proclamation of Admission dated the first day of March, 1867, with its eastern boundary adjacent to Missouri described as "the middle of the channel of said Missouri River, and following the meanderings thereof."

II.

Paragraph 4 of the complaint is denied for the reason that there are areas between Nebraska and Missouri where the boundary is no longer the Missouri River by reason of avulsions, leaving the boundary in the location of the old river bed.

III.

The first sentence of paragraph 5 of the complaint is denied for want of sufficient information to base an

answer. The second sentence of such paragraph is denied insofar as it alleges a divestiture. The third sentence of such paragraph is denied insofar as it alleges that claims for Nebraska taxes are unfounded or that the lands involved "have been in the undisturbed possession of Missourians from time immemorial." The last sentence of such paragraph is denied and defendant alleges in addition that no county or state official of Nebraska owes any explanation to plaintiff for the acts of his office.

IV.

Defendant is without information or belief upon which to base an answer to paragraph 6 of the complaint which is therefore denied. In addition, defendant states that such allegation is immaterial, and further that defendant claims ownership of no lands referred to in the amendment to complaint.

V.

Paragraph 7 of the complaint is denied insofar as it implies that efforts to establish a compact between the states had been exhausted prior to filing the complaint. Defendant's officials, particularly the Attorney General and State Surveyor believed at all times prior to the filing of the complaint that plaintiff intended to reciprocate the good faith efforts of defendant to resolve any areas of dispute existing between the two states.

VI.

As to the lands described in the amendment to complaint, defendant denies ownership in the persons named for the want of sufficient information upon which to base a belief.

VII.

As to areas referred to in plaintiff's amendment to complaint, defendant denies each and every allegation and alleges:

Tract 1: This land is not described by original government survey description. Apparently the description should be:

> "Fractional sections 16, 17, 20, 21, 22, 27, and 28, and accretions thereto, Township 1 North, Range 18 East of the Sixth P.M., Richardson County, Nebraska."

as shown on the original Government Survey. The description used in the amendment to complaint is apparently a "made" description effected by extending the original government survey lines of Missouri.

Plaintiff asserts no title or claim to the land described and defendant disclaims any legal or equitable ownership thereof.

The decree of the Nebraska Court quieting title as to the parties in the case is final. The matter is res judicata as to those parties and anyone claiming through them. To the extent this action is an attempt to avoid the decree in the *Durfee* v. *Duke* cases, this action should be dismissed as being for the benefit of private individuals and not for the benefit of the State of Missouri.

For additional answer as to this tract defendant alleges it to be in Nebraska.

Tract 2: This land is insufficiently described for defendant to respond to plaintiff's claim. The N½ of NE¼ of Section 3, Township 61 N, Range 40 W of the 5th P.M., is not contiguous to the balance of the described land.

Because of the insufficiency of description of the balance of this tract defendant is presently unable to locate these lands accurately.

The allegation that these lands accreted to the right bank of the Missouri River is admitted. No change thereafter is alleged which would transfer them to the plaintiff State as alleged and therefore defendant claims jurisdiction.

Tract 3: The Nebraska description to this tract is:

> Sections 23, 25, 26 and 36, and accretions thereto, Township 4 North, Range 16 East of the 6th P.M. and Section 31, and accretions thereto, Township 4 North, Range 17 East of the 6th P.M., Nemaha County, Nebraska.

This land was originally formed on the Nebraska side of the main channel and is in Nebraska.

Tracts 4 to 8: These tracts are in generally the same area and were originally part of land in Nebraska. Description from original Government Survey would place these lands in parts of:

> Sections 19, 20, 21, 27, 28, 29, 30, 31, 32, 33, 34, Township 7 North, Range 15 East of the 6th P.M., Otoe County, Nebraska.

No basis for plaintiff's claim is stated in the complaint. Defendant alleges these lands are within defendant's jurisdiction.

Defendant is unable to locate the tracts specifically because:

Tract 4 cannot be located from plaintiff's description.

Tract 5 recites 433.57 acres but describes approximately 80 acres.

Tract 6 cannot be located from plaintiff's description.

Tract 7 cannot be located from plaintiff's description.

Tract 8 cannot be located from plaintiff's description.

All claims to jurisdiction over the tracts described in the amendment to complaint require location of the present boundary lines between the states. Plaintiff has failed to describe the boundary in any location.

WHEREFORE, defendant prays that the complaint be dismissed or in the alternative that the court determine and decree that plaintiff has failed to establish its claim to the various parcels involved herein.

STATE OF NEBRASKA, Defendant

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 7, 1968, I served a copy of the foregoing Answer by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

Honorable Warren E. Hearnes
Governor of the State of Missouri
State Capitol
Jefferson City, Missouri

Honorable Norman H. Anderson
Attorney General,
State of Missouri
Supreme Court Building
Jefferson City, Missouri

Brick P. Storts, III
Assistant Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri

Howard L. McFadden
Assistant Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri

such being their post office addresses.

Howard H. Moldenhauer

Special Assistant Attorney
General of Nebraska
300 Continental Building
Omaha, Nebraska 68102

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1967.

No. 32 Original

STATE OF MISSOURI,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

PLAINTIFF'S SECOND AMENDMENT TO COMPLAINT.

The State of Missouri by leave of the Special Master, Honorable Gilbert H. Jertberg, Senior United States Circuit Judge for the 9th Circuit hereby files its amended complaint with respect to disputed lands along its common boundary with the State of Nebraska.

I.

AMENDMENT TO COMPLAINT.

The Lands in Dispute Are:

1. Lands owned by Julia Duke accreted to the left bank of the Missouri River more precisely described as follows:

PART E½ SECTION 8 FRACTIONAL SECTION 9 and West 73.04 Chains of **SECTION 10**, Township 60 North, Range 40 West, Holt County, Missouri,

Lying South of a slough and North of the left high bank of the presently realigned channel of the Missouri River and more particularly described according to a survey by the County Surveyor of Holt County, Missouri as follows:

Commencing 6.66 Chains South and 6.96 Chains West of the Quarter Section Corner between Sections 10 and 11, in Township 60 North, Range 40 West,

Thence North 76° 35′ West 3.40 Chains
Thence North 84° 05′ West 3.97 Chains
Thence North 78° 35′ West 4.96 Chains
Thence North 83° 20′ West 7.65 Chains
Thence North 76° 35′ West 5.22 Chains
Thence North 82° 15′ West 4.364 Chains
Thence North 81° 15′ West 3.76 Chains to a point 86 Links South of the center of said Section 10,
Thence North 81° 15′ West 3.27 Chains
Thence North 77° 45′ West 2.40 Chains to a point on a line East and West through the center of said Section 10, which point is 34.42 Chains East of the One-quarter (¼) Section Corner between Sections 9 and 10,
Thence North 77° 45′ West 4.00 Chains
Thence North 81° 20′ West 8.72 Chains
Thence North 87° 40′ West 4.45 Chains
Thence North 88° 03′ West 3.31 Chains
Thence North 81° 15′ West 1.84 Chains
Thence North 80° 10′ West 1.95 Chains
Thence North 78° 10′ West 6.35 Chains
Thence North 50° 00′ West 5.45 Chains to a point on the Section Line between Sections 9 and 10, said Township and Range, which point is 7.88 Chains North of the One-quarter (¼) Section Corner between Sections 9 and 10, said Township and Range,
Thence North 78° 05′ West 5.87 Chains
Thence North 87° 15′ West 11.51 Chains

Thence North 84° 15′ West 10.197 Chains

Thence North 73° 15′ West 13.358 Chains to a point which is 13.95 Chains North of the center of said Section 9,

Thence North 73° 15′ West 5.63 Chains

Thence North 73° 25′ West 6.95 Chains

Thence North 67° 45′ West 8.70 Chains

Thence North 65° 50′ West 3.15 Chains

Thence North 63° 45′ West 2.63 Chains

Thence North 65° 35′ West 6.27 Chains

Thence North 68° 10′ West 7.10 Chains

Thence North 66° 10′ West 4.08 Chains to a point on the Section Line between Sections 8 and 9, said Township and Range, which is 31.20 Chains North of the One-quarter (¼) Corner between Sections 8 and 9, said Township and range,

Thence North 68° 05′ West 3.04 Chains

Thence North 59° 05′ West 4.48 Chains

Thence North 57° 30′ West 7.328 Chains

Thence North 34° 35′ West 1.84 Chains to a point on the North Line of the Northeast One-quarter (NE¼), said Section 8,

Thence West along the North Line of Section 8, 25.08 Chains to a point on the left high bank of the presently realigned Missouri River Channel,

Thence Southeasterly following the left high bank of the present channel of the Missouri River along the following courses and distances:

South 15° 00′ East 15.83 Chains

South 12° 30′ East 5.21 Chains

South 42° 45′ East 11.95 Chains

South 51° 15′ East 10.00 Chains

South 44° 15′ East 6.33 Chains to a point on the East and West Center Line, Section 8, Township 60 North, Range 40 West, which is 13.63 Chains West of the One-quarter (¼) Corner between Sections 8 and 9,

South 44° 15′ East 17.67 Chains

South 54° 00′ East 1.60 Chains to a point on the East Line of the Southeast One-quarter (SE¼), Section 8, which is South 13.53 Chains from the One-quarter (¼) Corner on the line between Sections 8 and 9, said Township and Range,

Thence continuing Southeasterly along the left high bank of the presently realigned channel of the Missouri River as follows:

South 54° 00′ East 1.78 Chains
South 66° 00′ East 12.40 Chains
South 57° 00′ East 11.57 Chains
South 60° 45′ East 14.86 Chains
South 54° 45′ East 5.66 Chains to a point on the North and South Center Line, Section 9, which is 36.53 Chains South of the center of said Section 9,
South 53° 45′ East 1.67 Chains
South 64° 45′ East 3.59 Chains
South 76° 45′ East 4.11 Chains to a point on the South Line of Section 9, which is 31.41 Chains West of the Northeast Corner, Section 16, said Township and Range,
South 76° 45′ East 6.00 Chains
South 81° 45′ East 7.40 Chains
South 77° 30′ East 10.57 Chains
North 89° 15′ East 2.86 Chains
North 77° 15′ East 3.50 Chains
South 79° 45′ East 1.67 Chains to a point on the East Line of the Northeast One-quarter (NE¼), Section 16, which is 4.21 Chains South of the Northeast Corner of said Section 16,

Thence continuing Easterly along said high left bank of the presently realigned channel of the Missouri River across the North part of fractional Section 15 as follows:

South 79° 45′ East 3.18 Chains
North 78° 00′ East 7.45 Chains

North 73° 30′ East 11.57 Chains to a point on the North Line of Section 15 which is 21.51 Chains East of the Northwest Corner said Section 15,

North 73° 30′ East 11.57 Chains to a point on the North Line of Section 15 which is 21.51 Chains East of the Northwest Corner said Section 15,

North 73° 30′ East 7.53 Chains
North 68° 00′ East 10.00 Chains
North 71° 00′ East 2.12 Chains to a point on the North and South Center Line of Section 10, which is 32.59 Chains South of the center of said Section 10,

North 71° 00′ East 17.03 Chains
North 86° 00′ East 2.82 Chains
North 80° 00′ East 6.00 Chains
North 75° 30′ East 8.48 Chains

Thence leaving the left high bank of the presently realigned channel of the Missouri River North parallel with and 6.96 Chains West of the East Line of the Southeast One-quarter (SE¼), Section 10, Township 60 North, Range 40 West, a distance of 17.89 Chains to the point of Beginning containing 770.40 Acres.

2. Lands owned by Peter Blohm (erroneously described in the first amended complaint as accreted to the right bank of the Missouri River) accreted to the left bank of the Missouri River and severed from the said left bank by engineering realignment more particularly described as follows:

PART SECTIONS 3 and 10 Township 61 North, Range 40 West,

Lying West of the existing right high bank of the Missouri River Channel as the same has been stabilized by the construction and maintenance of a series of pile dykes and by channel realignment excavation by the use of dredge or

other types of earth moving equipment in 1938 by the Corps of Engineers, U.S. Army, and extending Westerly to the center of the Main River Channel, as it existed immediately prior to the realignment work as shown by hydrographic soundings taken as of April 1, 1937, all of which area is more particularly described as follows:

Note: All bearings shown herein are based upon plane coordinates with triangulation Station Weston is referred to as the origin (See Missouri River Banks Sheet No. 6 prepared by the State Surveyor's Office, State of Nebraska, from U.S. Army, Corps of Engineer Plans)

Beginning at a point in the center of the Missouri River Channel as the same existed on the 1st day of April, 1937, which point bears South 88° 56′ 43″ West 3530.57 feet from a property corner stone marking the common corner to Sections 2, 3, 10, and 11, Township 61 North, Range 40 West, in Holt County, Missouri,

Thence following the meanders of the center line of the Missouri River Channel as it existed on April 1, 1937, along the following courses and distances

North 10° 16′ 30″ West	1626.06 feet
North 11° 06′ East	1039.45 feet
North 12° 18′ East	798.27 feet
North 44° 56′ West	283.23 feet
North 55° 10′ West	804.08 feet

North 57° 10′ 14″ West 130.91 feet to a point on a curve the tangent for which bears South 79° 54′ 47.7″ East on the right high bank of the realigned Missouri River Channel and 200 feet South of the established low water bank line and bears South 62° 52′ 53″ West 2,036.77 feet from T. B. M. 223 established by the Nebraska State Surveyor on the North side of the realigned Missouri River Channel, the established coordinates for which as determined by the

Nebraska State Surveyor's Office being North 265,489.20, West 141,357.10,

Thence continuing Easterly and Southerly parallel with and 200 feet Westerly from the established low water bank line along a curve to the right having a radius of 4441.33 feet through a central angle of 69° 01′ 37.7″, a distance of 5350.71 feet to a point of tangent for said curve,

Thence South 10° 53′ 10″ East, a distance of 670.00 feet to a point of curve,

Thence Southwesterly parallel with and 200 feet Westerly from the established low water bank line along a curve to the right having a radius of 4653.84 feet through a central angle of 41° 00′, a distance of 3330.23 feet to the intersection with the center line of the Missouri River Channel as the same existed on April 1, 1937, and the Southeast Corner of the tract herein described which point bears South 27° 29′ 14″ West, 903.86 feet from Corps of Engineers triangulation monument right 518.9 for which the established Weston Coordinates are North 527,926.92, West 139,587.11,

Thence Northwesterly following the center line of the Missouri River Channel as the same existed on April 1, 1937, immediately prior to the realignment of said channel by the Corps of Engineers in 1938, along the following courses and distances:

North 50° 36′ 38″ West 512.14 feet
North 30° 59′ West 408.00 feet
North 15° 11′ West 725.33 feet
North 45° 00′ West 381.84 feet
North 73° 29′ West 1230.78 feet
North 15° 51′ 30″ East 914.92 feet
North 8° 32′ East 404.50 feet to the point of Beginning.

The tract herein above described contains 297.14 Acres.

3. Lands belonging to Glen Haer having formed as an island to the left of the main channel of the Missouri River more particularly described as follows:

PART SECTIONS 5, 6, 7, 8, and 17, Township 63 North, Range 41 West, Atchison County, Missouri

Lying West of the right bank of the Missouri River Channel as the same has been realigned by the Corps of Engineers, U.S. Army, by dredging and by the installation of an extensive system of pile dikes extending from the West high bank of the River Easterly to the existing Main Right bank of the realigned channel all as more particularly indicated by the Hydrographic Survey made by the Corps of Engineers in 1938, the center of the main river channel as indicated by the river sounding immediately prior to the realignment as compared to the right bank of the realigned river channel is described as follows:

Beginning at a point of intersection with the right high bank of the realigned channel and the center line of channel immediately prior to such realignment which point is 670 feet more or less North and 6800.00 feet more or less West (Computed) of the North One-quarter Corner, Section 8, Township 63 North, Range 41 West, in Atchison County, Missouri,

Thence, following along the center line of the now abandoned channel of the Missouri River as the same existed in 1938 as follows:

South	54° 06′ 26″	East	1876.28 feet,
South	45° 00′	East	1131.37 feet,
South	33° 41′ 24″	East	1081.67 feet,
South	32° 16′ 32″	East	2247.25 feet,
South	33° 41′ 24″	East	721.11 feet,
South	14° 37′ 15″	West	475.40 feet,

South 15° 46′ 50″ East 1912.07 feet,
South 24° 26′ 38″ East 1208.30 feet,
South 40° 39′ 24″ East 1120.44 feet,
South 36° 15′ 14″ East 186.01 feet to a point on the right low water bank of the presently realigned channel of the Missouri River,

Thence, Northerly following the approximate low water right bank of the realigned Missouri River Channel as follows:

North 16° 31′ 22½″ East 488.86 feet to a point which is 349.17 feet South and 257.83 feet East of U.S. Corps of Engineers Triangulation Monument right 536.8 for which the Corps of Engineers have established following coordinates North 317,817.84 West 184,778.80,

Thence, continue Northerly along the right low water bank of the realigned channel of the Missouri River,
North 22° 13′ 32″ East 422.34 feet,
North 21° 14′ 24° East 344.55 feet,
North 23° 22′ 40° East 490.08 feet,
North 24° 17′ 36″ East 430.50 feet to a point which bears South 46° 00′ East 170 feet from a point bearing North 30° 53′ 30″ East 1542.0 feet from U.S. Corps of Engineers Triangulation Monument right 536.8,

Thence North 24° 41′ 17″ East a distance of 572.23 feet to a point of curve,

Thence Northerly along a curve to the Left having a radius of 4874.30 feet through a central angle of 27° 39′ 40″ a distance of 2353.21 feet to the point of tangent for said curve and a point of curve ahead.

Thence Northwesterly along a curve to the Left having a radius of 4336.06 feet through a central angle of 20° 21′ 50″ a distance of 1541.11 feet to the point of tangent for said curve and a point of curve ahead,

Thence continuing Northwesterly along a curve to the Left having a radius of 5337.77 feet through a central angle of 36° 55′ 12″ a distance of 3750.07 feet to the point of tangent for said curve,

Thence North 60° 15′ 25″ West a distance of 1054.18 feet to a point of curve,

Thence Southwesterly along a curve to the Left having a radius of 3824.17 feet through a central angle of 34° 50′ 35″ a distance of 2325.56 feet to the point of tangent for said curve,

Thence continuing Westerly along the Right Low water bank of the realigned Missouri River South 84° 54′ 00″ West a distance of 1050.00 feet to a point of curve,

Thence Westerly along a curve to the Right having a radius of 3560.00 feet through a central angle of 15° 55′ 03″ a distance of 989.12 feet to a point of intersection of the low water bank line of the realigned channel of the Missouri River with the approximate centerline of the Missouri River Channel as the same existed in 1938 prior to the channel realignment by the Corps of Engineers,

Thence South 38° 08′ 51″ West a distance of 36.69 feet to the point of Beginning on the Right high bank of the realigned channel.

The tract above described contains 657.57 Acres more or less

4. The property of Alex and Arthur Vogel accreted to the left bank of the Missouri River more particularly described as follows:

FRACTIONAL SECTIONS 10, 15 & 22 Township 66 North, Range 43 West, Atchison County, Missouri, Lying East of the presently stabilized left high bank of the Missouri River,

together with a strip of land 330 feet wide off the West side of Sections 11, 14, and 23, said Township and Range,

Excepting from the above tracts all that part thereof lying North of the following described line,

Beginning at a point which is 330 feet East and 1896.00 feet North of the East One-quarter (E¼) Corner, Section 10, Township 66 North, Range 43 West,

Thence Northwest along a line which deflects left 76° 12′ from the East Line of the West 330 feet of Section 11, a distance of 892.4 feet to a point of angle

Thence continuing Northwest along a line which deflects left from the preceeding course 7° 28′, a distance of 1751 feet to a corner pipe set on the left high bank of the Missouri River.

The tract as above described contains the following:

Fractional Section 10 Lying South of Described Line	242.50 Acres
West 330 feet Section 11 Lying South of Described Line	34.70 Acres
West 330 feet Section 14	40.00 Acres
Fractional Section 15 Lying East of Left Bank of River	288.20 Acres
Fractional Section 22 Lying North of Left Bank of River	6.90 Acres
West 330 feet Section 23 Lying North of Left Bank of River	4.20 Acres
Total Acres in Tract	616.50 Acres

5. The property of Ernest Nennemann accreted to the left

bank of the Missouri River more particularly described as follows:

PART E½ SECTION 11 & PART E½ E½ SECTIONS 14 & 23 Township 66 North, Range 43 West, Atchison County, Missouri more particularly described as follows:

Beginning at the Southeast Corner of said Section 11,

Thence North along the Section Line a distance of 440 feet ± to a point on the Northerly property line in the center of a chute,

Thence Northwest along said established property line following the center of a chute which according to the Riddle Engineering Company's map which accompanied their survey of January 18, 1956 was located as follows:

From the last described point, Thence Northwest to a point 1060 feet ± North and 500 feet ± West of the Southeast Corner said Section 11,

Thence Northwest to a point 1630 feet ± North and 750 feet ± West of said Southeast Corner, Section 11,

Thence Northwest to a point 2330 feet ± North and 1220 feet West of said Southeast Corner, Section 11,

Thence Northwest to a point 250 feet ± North and 870 feet East of the center of Section 11,

Thence Northwest to a point on the North and South Center Line, Section 11, which is 730 feet ± North of the center of Section 11,

Thence leaving the center line of chute South along the North and South Center Line of Section 11, a distance of 2923 feet more or less to the center of a public road which is 447 feet North of the South One-quarter (S¼) Corner, Section 11,

Thence Southeast and East along the center line of the public road to a point on the East Line of the Southwest One-quarter (SW¼), Southeast One-quarter (SE¼), Section 11, which is 60 feet more or less North of the Southeast Corner, Southwest One-quarter (SW¼), Southeast One-quarter (SE¼), Section 11, Township 66 North, Range 43 West,

Thence South along the North and South Center Line of the East One-half (E½), Sections 11, 14, and 23, a distance of 6045.00 ± feet to an iron pipe set on the left high bank of the presently stabilized channel of the Missouri River,

Thence Northeast along said left high bank of the Missouri River across the Northeast One-quarter (NE¼), Northeast One-quarter (NE¼), Section 23 to a point on the East Line of Section 23 which is 455 feet South of the Northeast Corner, said Section 23, Township 66 North, Range 43 West,

Thence North along the East Line of Sections 23 and 14, a distance of 5735.00 feet to the point of Beginning.

The tract above described contains the following acreage:

SW¼ NE¼ Sec. 11 Southwest of Chute	10.60 Acres
N½ SE¼ Sec. 11 Southwest of Chute	51.91 Acres
S½ SE¼ Sec. 11 North of Road	70.02 Acres
NE¼ NE¼ Sec. 14	41.38 Acres
SE¼ NE¼ Sec. 14	41.38 Acres
NE¼ SE¼ Sec. 14	41.38 Acres
SE¼ SE¼ Sec. 14	41.38 Acres
NE¼ NE¼ Sec. 23 North of River Bank	18.00 Acres
Total	316.09 Acres

6. The property of E. B. and Leola Nennemann accreted to the left bank of the Missouri River more particularly described as follows:

PART SOUTHWEST CORNER SECTION 12 and PART W-¾ SECTION 13 and PART NW¼ NW¼ SECTION 24 Township 66 North, Range 43 West, Lying Southwest of chute and North of the left high bank of the Missouri River as the same has been stabilized by the Corps of Engineers, U. S. Army, said tract being more particularly described as follows:

Beginning at a point in the center of a chute which is 160 feet more or less North of the Southwest Corner, Section 12,

Thence South along the West Line of Sections 12, 13, and 24, a distance of 5795.00 feet more or less to an iron pipe on the left high bank of the Missouri River stabilized channel,

Thence Northeast following said left high bank of the Missouri River across the Northwest Corner, Section 24, and across the Southeast Corner of the Southeast One-quarter (SE¼), Southwest One-quarter (SW¼), Section 13, also across the South part of the Southwest One-quarter (SW¼), Southeast One-quarter (SE¼) said Section 13 to a point on the North and South Center Line of the East one-half (E½), Southeast One-quarter (SE¼), Section 13, which is 760 feet more or less South of the Northeast Corner, Southwest One-quarter (SW¼), Southeast One-quarter (SE¼), Section 13,

Thence North along the North and South Center Line East One-half (E½), Section 13, a distance of 1930 feet more or less to the center of a chute,

Thence Northwesterly following the center of said chute across the West One-half (W½), Northeast One-quarter (NE¼), Section 13 to a point 1460 ± North of the center said Section 13,

Thence across Northeast One-quarter (NE¼), Northwest One-quarter (NW¼), Section 13 to a point on the North

and South Center Line, Northwest One-quarter (NW¼), Section 13, which is 960 ± feet North of the Southwest Corner, Northeast One-quarter (NE¼), Northwest One-quarter (NW¼), said Section 13,

Thence across the Northwest One-quarter (NW¼), Northwest One-quarter (NW¼), Section 13 to a point 330 ± feet East of the Northwest Corner, said Section 13,

Thence across the Southwest Corner, Section 12, Township 66 North, Range 43 West, to the point of Beginning.

The tract above described contains the following acreage:

Southwest Corner Sec. 12 South of Chute	0.56 Acres
NW¼ NE¼ Sec. 13 Southwest of Chute	1.00 Acres
SW¼ NE¼ Sec. 13 Southwest of Chute	25.00 Acres
NE¼ NW¼ Sec. 13 Southwest of Chute	19.15 Acres
NW¼ NW¼ Sec. 13 Southwest of Chute	34.70 Acres
S½ NW¼ Sec. 13	80.00 Acres
N½ SW¼ Sec. 13	80.00 Acres
SW¼ SW¼ Sec. 13	40.00 Acres
SE¼ SW¼ Sec. 13 N. of left bank of Mo. River	32.00 Acres
NW¼ SE¼ Sec. 13	40.00 Acres
SW¼ SE¼ Sec. 13 N. of left bank of River	19.96 Acres
NW¼ NW¼ Sec. 24 N. of left bank of River	6.20 Acres
Total	378.57

No. 7 the property of Gene Fender accreted to the left bank of the Missouri River more particularly described as follows:

PART W-¾ SECTION 12 AND SECTION 13 Township 66 North, Range 43 West, Atchison County, Missouri Lying Northeast of chute and more particularly described as follows:

Beginning at a point on the West Line of the Southwest One-quarter (SW¼), Southwest One-quarter (SW¼), Section 12 in the center of a chute which is 160 feet more or less North of the Southwest Corner said Section 12,

Thence North along the West line of Section 12, a distance of 5120 feet more or less to the Northwest Corner, said Section 12,

Thence East along the North Line of the Northwest One-quarter (NW¼), Section 12, a distance of 2640 feet more or less to the North One-quarter (N¼), Section Corner and a point on the boundary line of the Buchanan Drainage District No. 1,

Thence Southeast following said District Boundary Line to a point on the North and South Center Line of the Northeast One-quarter (NE¼), Section 12, which is 770 feet more or less North of the Southeast Corner Northwest One-quarter (NW¼), Northeast One-quarter (NE¼), said Section 12.

Thence South along the North and South Center Line East One-half (E½), Sections 12 and 13, a distance of 7550.00 feet more or less to a point in the center of an old river chute which is 160 feet more or less south of the Southeast Corner, Southwest One-quarter (SW¼), Northeast One-quarter (NE¼), said Section 13,

Thence Northwesterly following the center line of an old river chute across the West One-half (W½), Northeast One-quarter (NE¼), Section 13 to a point 1460 ± feet North of the center of said Section 13,

Thence across the Northeast One-quarter (NE¼), Northwest One-quarter (NW¼), Section 13 to a point on the North and South Center Line Northwest One-quarter (N.W¼), Section 13 which is 960 ± feet North of the Southwest Corner, Northeast One-quarter (NE¼), Northwest One-quarter (NW¼), said Section 13,

Thence continuing Northwest across the Northwest One-quarter (NW¼), Northwest One-quarter (NW¼), Section 13 to a point 330 ± feet East of the Northwest Corner said Section 13,

Thence across the Southwest Corner, Section 12, Township 66 North, Range 43 West, to the point of Beginning.

The tract above described contains the following acreage:

NW¼ NE¼ Sec. 12, Township 66 North, Range 43 West, Lying Southwest of Buchanan Drainage District Boundary Line	32.00 Acres
SW¼ NE¼ Sec. 12	40.00 Acres
E½ NW¼ Sec. 12	80.00 Acres
W½ NW¼ Sec. 12	78.80 Acres
NE¼ SW¼ Sec. 12	40.00 Acres
NW¼ SW¼ Sec. 12	39.40 Acres
SW¼ SW¼ Sec. 12 Lying N. of old River Chute	38.84 Acres
SE¼ SW¼ Sec. 12	40.00 Acres
W½ SE¼ Sec. 12	80.00 Acres
W½ NE¼ Sec. 13 Lying N. of Center Line of old River Chute	54.00 Acres
N½ NW¼ Sec. 13 Lying N. of Center Line of old River Channel	26.15 Acres
Total	549.19 Acres

8. The property of Ray Hodde accreted to the left bank of the Missouri River more particularly described as follows:

NORTHEAST PART SECTION 11, Township 66 North, Range 43 West, Atchison County, Missouri,

Lying Northeast of an old river chute more particularly described as follows:

Beginning at a point in the center of the old river chute which 400 feet more or less from Southeast Corner, Section 11,

Thence Northwesterly following the center line of the old river chute to a point which is 1060 ± feet North and 500 ± feet West of the Southeast Corner, said Section 11.

Thence continuing Northwesterly to a point which is 1630 ± feet North and 750 ± feet West of Said Southeast Corner, Section 11,

Thence Northwest to a point which is 2330 feet ± North and 1200 ± feet West of the Southeast Corner, Section 11,

Thence Northwest to a point 250 ± feet North and 870 feet East of the center of Section 11,

Thence Northwest to a point on the North and South Center Line, Section 11, which is 730 ± feet North of the center of Section 11,

Thence Northwest to a point 1240 ± feet North and 660 feet West of the center, said Section 11,

Thence Northwest on a direct line to a point 1896 feet North and 330 feet East of the West One-quarter (W¼), Corner, Section 11,

Thence Northwest along a line which deflects West 76° 12′ from the North prolongation of a line parallel with and 330 feet East of the West Line of Section 11, a distance of 339.81 feet to a point on the West Line of the Northwest One-quarter (NW¼), Northwest One-quarter (NW¼), Section 11, which is 1977.06 feet North of the West One-quarter (W¼) Corner, Section 11,

Thence North 662.94 feet more or less to the Northwest Corner, Section 11,

Thence East along the North Section Line to the Northeast Corner, Section 11,

Thence South along the East Line of Section 11, a distance of 4840 feet more or less to the place of Beginning.

The tract above described contains the following acreage:

NE¼ NE¼ Sec. 11 Township 66 North, Range 43 West	40.76 Acres
NW¼ NE¼ Sec. 11 Township 66 North, Range 43 West	41.36 Acres
SW¼ NE¼ Sec. 11 Lying North of old river chute	30.72 Acres
SE¼ NE¼ Sec. 11	40.76 Acres
NE¼ NW¼ Sec. 11 Lying North of old river chute	38.97 Acres
NW¼ NW¼ Sec. 11 Lying North of old river chute	26.30 Acres
SE¼ NW¼ Sec. 11 Lying North of old river chute	5.38 Acres
NE¼ SE¼ Sec. 11 Lying North of old river chute	29.90 Acres
NW¼ SE¼ Sec. 11 Lying North of old river chute	0.30 Acres
SE¼ SE¼ Sec. 11 Lying North of old river chute	6.69 Acres
Total	261.14 Acres

9. The property of Alma Winkler accreted to the left bank of the Missouri River more particularly described as follows:

PART W½ SECTIONS 14 and 23, Township 66 North, Range 43 West, Atchison County, Missouri,

Lying North of the left high bank of the presently stabilized Missouri River Channel,

Except the West 330 feet thereof, also except all that part lying North of the boundary line of the Buchanan Drainage District which boundary line is more particularly described as follows:

Beginning at a point which is 295 feet North and 330 feet East of the West One-quarter (W¼) Corner, said Section 14,

Thence Easterly to a point 270 feet more or less North and 730 feet more or less East of the West One-quarter (W¼) Corner, Section 14,

Thence Southeasterly to a point 100 feet more or less North and 1280 feet more or less East of said West One-quarter (W¼) Corner, Section 14,

Thence Southeast on a direct line to a point on the North and South Center Line South One-half (S½), Section 14, which is 925 feet South of the center, said Section 14,

The tract above described contains the following acreage:

PART-EAST-⅞ W½ Sec. 14 Lying South of the District Boundary Line above described	131.70 Acres
PART EAST-⅞ W½ Sec. 23 Lying North of the left bank of River	35.90 Acres
Total	167.60 Acres

Respectfully submitted,

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Attorneys for Plaintiff,
State of Missouri.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 32, Original

STATE OF MISSOURI,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant.

STIPULATION FOR DISMISSAL
AND
MOTION TO DISMISS

Come now the parties hereto and stipulate and agree as to the following facts:

1. Motion for Leave to File a Complaint in the Supreme Court of the United States was filed by Norman H. Anderson, Attorney General, State of Missouri, in the October Term of Court, 1966, together with the Complaint herein.

2. On or about July 20, 1967, Clarence A. H. Meyer, Attorney General, State of Nebraska, filed a Brief in Opposition to said Motion and Complaint of the State of Missouri.

3. Jurisdiction of the above-styled cause was accepted by the Supreme Court of the United States on De-

cember 11, 1967, and the above cause is now pending in The Supreme Court of The United States.

4. Since the filing of the complaint in this matter, both parties have expended considerable efforts in an attempt to effect a legislative resolution of this dispute.

5. Both parties recognize that continued litigation is detrimental to their respective interests and desire a termination of this matter so as to minimize future conflict.

TO TERMINATE THIS DISPUTE, AND TO SECURE DISMISSAL OF THIS ACTION, THE STATES OF MISSOURI AND NEBRASKA FURTHER STIPULATE AND AGREE AS TO THE FOLLOWING:

6. The original boundary line of the State of Nebraska, contiguous to Missouri, as established by the Nebraska enabling act, was the middle of the channel of the Missouri River.

7. The original boundary line of the State of Missouri, contiguous to Nebraska, as established by the Platte Purchase Act, was the middle of the main channel of the Missouri River.

8. The flow of the Missouri River has changed its course and the main channel of said river has changed its position in many areas along said common territorial boundary between said States by the forces of nature and construction by the U. S. Army Corps of Engineers.

9. Disputes between the State of Missouri and the State of Nebraska, their political and governmental subdivisions, citizens and other persons have arisen and now exist with respect to the location of the true boundary between the States.

10. There has for many years existed as between the State of Missouri and the State of Nebraska a question as to the location of the true and correct boundary line between said States. In some areas land is taxed or may be taxed by both States while in other areas land may be untaxed by either State, and confusion exists as to which State's courts have jurisdiction over some lands.

11. The Missouri River is now relatively stabilized by work done under the direction and the supervision of the United States Army Corps of Engineers and a boundary based upon a stabilized main channel of the Missouri River would be, if the works are properly maintained, as near as can be anticipated at this time, fixed and permanent.

12. It is to the best interest of the States of Missouri and Nebraska, their political and governmental subdivisions and their citizens, to locate and determine an identifiable boundary line between the States, avoid litigation and multiple exercises of sovereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said States with respect to the location of the boundary between the States.

13. The States are not recognizing and do not desire to recognize the identifiable boundary line described herein as the true and correct former boundary line between the States, except to recognize the historical fact that the United States Congress, in creating the party states, determined that their common boundary was the Missouri River.

14. Neither State is recognizing any presumptions that the river has moved gradually into the present designated channel location because of the numerous natural

cutoffs over the years and the construction and stabilization work done by the Corps of Engineers, which included the dredging of canals and constructions of dikes and revetments, moving the river around and across islands, bar areas, and lands.

15. The States recognize that the United States Army Corps of Engineers has dug numerous canals leaving lands formerly on one side of the river isolated on the other side and the States recognize there may have been many natural cutoffs of the Missouri River prior to the stabilization work by the Corps of Engineers.

16. As to lands along or in proximity to the Missouri River, the States desire not to disturb private titles or claims which may have been established by private individuals by recognizing or locating any specific areas as belonging to or being within one State or the other, but, rather, the States desire to leave any question of private titles to such parties involved.

17. The parties recognize that the present main navigable channel of the Missouri River, as it exists within the designated channel as stabilized by the United States Army Corps of Engineers, is or may be different from a line parallel and equidistant from the present banks of the Missouri River.

18. It is the principal purpose of the party States in entering into this stipulation to recommend an identifiable boundary between the State of Missouri and the State of Nebraska for the entire distance thereof, without interfering with or otherwise affecting private rights or titles to property, and the party States declare that further compelling purposes herein are:

(A) To create a friendly and harmonious interstate relationship;

(B) To minimize multiple exercise of sovereignty and jurisdiction, including matters of taxation, judicial and police powers and exercise of administrative authority;

(C) To encourage settlement and disposition of pending legislation and criminal proceedings and avoid or minimize future disputes and litigation;

(D) To promote economic and political stability;

(E) To encourage the optimum mutual beneficial use of the Missouri River, its waters and its facilities;

(F) To establish an atmosphere for settlement of future disputes;

(G) To express the intent and policy of the States that the common boundary should be established within the confines of a stabilized main channel of the Missouri River, except at McKissick's Island as determined and described by the Supreme Court of the United States in the case of *Missouri* v. *Nebraska*, 196 U.S. 23, and 197 U.S. 577, and except at places of avulsion, previously occurred or hereafter occurring, and, that both States shall continue to have access to and the use of the waters of the river;

(H) To recognize the fact that the judicial process no longer lends itself to an economically feasible solution of political disputes between the peoples of the two States.

19. No future alteration of the boundaries of the States of Missouri and Nebraska, resulting from a change

in a stabilized main channel of the Missouri River caused by natural processes, should disturb pre-existing private rights or claims.

20. Nothing in this stipulation should be deemed or construed to affect any litigation in any of the courts located in either of the States of Missouri or Nebraska.

21. The public record of real estate titles, mortgages and other liens in the State of Missouri to any lands, along or in proximity to the Missouri River, should continue to be accepted as evidence of record title to such lands by the courts of the State of Nebraska.

22. The public record of real estate titles, mortgages and other liens in the State of Nebraska to any lands, along or in proximity to the Missouri River should continue to be accepted as evidence of record title to such lands by the courts of the State of Missouri.

23. As to such lands, the recording officials of the counties of each state should accept for filing documents of title using legal descriptions derived from the land descriptions of the other state. The acceptance of such documents for filing should have no bearing upon the legal effect or sufficiency thereof.

24. Neither state should levy taxes on lands lying outside of its boundary line established pursuant to the principal purposes stated herein.

25. This stipulation for dismissal should not deprive any riparian owner of such riparian owner's rights based upon riparian law, and the recommended boundary line between the states should not in any way be deemed to change or affect the boundary line of riparian owners along the Missouri River as between such owners and es-

tablishment of the recommended boundary line should not operate to limit such riparian owner's rights to accretions across such recommended boundary line.

26. No private individual or entity claiming title to lands along the Missouri River should be prejudiced hereby and any claims or possessory rights necessary to establish adverse possession should not be terminated or limited by the fact that the jurisdiction over such lands may be affected by this stipulation. Neither State should assert any claim of title to abandoned beds of the Missouri River, lands along the Missouri River, or the bed of the Missouri River based upon any doctrine of State ownership of the beds or abandoned beds of navigable waters, as against any land owners or claimants claiming interest in real estate arising out of titles, muniments of title, or exercises of jurisdiction of or from the other state.

27. It is intended by the parties that the terms of this stipulation should be binding upon the party States, their political and governmental subdivisions, and the officers and agents thereof.

28. The parties have each deposited the sum of $2,500.00 with the Special Master, the late Gilbert H. Jertberg, for the payment of the costs of this action.

29. It is intended by the parties that any remaining funds previously deposited with the Special Master should be sent to the Clerk of the United States Supreme Court and remitted, after the deduction of further costs, if any, to the Attorneys General of the respective States in equal amounts.

30. For the reasons stated hereinabove it is respectfully moved by the parties hereto that the Petition of the Plaintiff be dismissed.

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